Supreme Court, U.S.
FILED
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No. 96-243

In the

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,
Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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Petition for Certiorari filed August 12, 1996
Certiorari granted October 15, 1996

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Docket No. 94-15768

June 24, 1994	Appellant's Opening Brief
July 27, 1994	Answering Brief of Respondent TRPA
August 10, 1994	Reply Brief of Appellant
April 1, 1996	Opinion

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FILED 1/28/91

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,	)	Case No. CV-N-91-040- HDM
	)	
	)	COMPLAINT
Plaintiff,	)	
vs.	)	
TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA, STATE OF CALIFORNIA, and the COUNTY OF WASHOE, A Political Subdivision of the STATE OF NEVADA,	)	
Defendants.	)	

Plaintiff, BERNADINE SUITUM, as and for a claim for relief against the above-named Defendants, alleges as follows:

I

JURISDICTION

1. This is an action claiming the invalidity of certain ordinances and regulations adopted by the TAHOE REGIONAL PLANNING AGENCY ("TRPA") and the invalidity of certain actions taken by the TRPA pursuant thereto or, in the alternative, that said regulations and actions constitute an improper taking of the Plaintiff's property and are in violation of Plaintiff's civil rights. Jurisdiction is based on 28 U.S.C. 1331, with Federal Questions arising under the Tahoe Regional Planning Compact between California and Nevada, Pub.L.No. 91-148, 83 Stat. 360 (1969), Amended, Pub.L. 96-551, 94 Stat. 3233; N.R.S. § 277.190 et seq., and the Fifth and Fourteenth Amendments of the United States Constitution. Jurisdiction is also based on 28 U.S.C. 1343, in that Plaintiff claims that Defendant's acts are in violation of her civil rights as provided in 42 U.S.C. 1983.

II

GENERAL ALLEGATIONS

2. In 1972, the Plaintiff acquired a residential subdivision lot identified as Lot 15, Block K, Washoe County Assessor's Parcel No. 130-211-30, in the Mill Creek Subdivision located in Incline Village, Washoe County, Nevada (hereinafter referred to as "Subject Lot"). Since that time, it has been and continues to be the intent and purpose of the Plaintiff to construct a single-family residence on the Subject Lot. Due to a variety of circumstances, including an unfortunate illness and subsequent death of her husband, the Plaintiff was not in a position to undertake the construction of a home on the Subject Lot until very recently. Because of the action taken by Defendant TAHOE REGIONAL PLANNING AGENCY (hereinafter referred to as "TRPA"), as more fully described below, the Plaintiff has been denied that right.

3. Since 1972, the Plaintiff has paid all taxes and assessments for the Subject Lot, including utility fees and public improvement assessments. The Mill Creek Subdivision is substantially built out. The Subject Lot is one of the few undeveloped lots within the subdivision. The Subject Lot is surrounded on three (3) sides by existing houses and on the fourth side by an improved street containing all utilities to service the Subject Lot.

4. The TRPA has adopted an Individual parcel Evaluation System ("IPES") which was implemented in 1989. Prior to the adoption of IPES, the Subject Lot had been classified as land Capability No. 6 which would allow for the construction of a residence.

5. In 1989, Plaintiff applied for and received a Residential Allocation from the COUNTY OF WASHOE for the construction of a house on the Subject Lot. Subsequent to obtaining the Residential Allocation and in accordance with the terms thereof, Plaintiff attempted to submit building plans for a single-family detached dwelling unit to the TRPA for approval. After submitting these building plans, the TRPA conducted a field verification, the results of which designated the Subject Lot as being located in a Stream Environment Zone ("SEZ") which prohibited the construction of a single-family residence. The TRPA also conducted an IPES review of the Subject Lot. The IPES score for the Subject Lot as determined by the TRPA was zero (0) which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot.

6. Plaintiff appealed the field verification which classified the Subject Lot as "SEZ" and the IPES score of) to the TRPA. These appeals were combined into a single appeal process. This appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 27, 1990. At that time, the TRPA acted to deny the Plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. The effect of the determination of the TRPA was to deny the Plaintiff the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot.

7. The TRPA was created by the States of Nevada and California and acts under the authority granted to the TRPA by those States. The States of California and Nevada have delegated regulatory powers, including the police power of land use regulation of private property, to the TRPA for lands located within the Tahoe Basin. In addition, Nevada and California provide the funding for the operation and maintenance of the

TRPA. The States of Nevada and California are responsible for the actions of the TRPA.

8. Plaintiff has exhausted all reasonably available administrative remedies.

9. It has been necessary for the Plaintiff to retain counsel for the prosecution of this matter and in addition to all other relief requested hereunder the Plaintiff is entitled to an award of reasonable attorneys' fees.

III

FIRST CLAIM FOR RELIEF

10. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

11. The action taken by the TRPA in denying Plaintiff the right to construct a residence of the Subject Lot is arbitrary, capricious, unlawful and does not protect any legitimate public interest and is, therefore, and improper exercise of police power.

12. The action taken by the TRPA with respect to the Subject Lot should be declared invalid, and the TRPA should be ordered to allow Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

IV

SECOND CLAIM FOR RELIEF

13. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

14. The action taken by the TRPA as applied to Plaintiff and the Subject Lot is unconstitutional in violation of the Fifth and Fourteenth Amendments of the United States Constitution and should thereby be declared invalid.

V

THIRD CLAIM FOR RELIEF

15. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

16. The action taken by the TRPA constitutes a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution for which Plaintiff is entitled to just compensation in excess of $50,000.

VI

FOURTH CLAIM FOR RELIEF

17. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

18. The action taken by the TRPA was taken under the color of state law of the States of California and Nevada and the TRPA Compact and deprived the Plaintiff of her rights, privileges and immunities secured by the Constitution of the United States, and as a result thereof, Defendants and each of them are liable to Plaintiff for damages in excess of $50,000.

VII

FIFTH CLAIM FOR RELIEF

19. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

20. Since acquiring the Subject Lot in 1972, Plaintiff has paid property taxes and special assessments to Defendant, WASHOE COUNTY. Because Plaintiff has been denied the use of her property, Plaintiff and the Subject Lot have been denied the benefits to be derived from the payments of assessments and taxes.

21. Plaintiff is entitled to reimbursement of all taxes and special assessments paid to Defendants, WASHOE COUNTY, the STATE OF NEVADA and the TRPA.

WHEREFORE, Plaintiff prays for relief as follows:

1. That the Court declare that the action taken by the TRPA denying the Plaintiff the right to build on the Subject Lot is invalid and unlawful.

2. That the TRPA be ordered to permit Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

3. That the Plaintiff be awarded damages for the taking of her property without due process of law, including damages for the fair market value of the Subject Lot taken and all taxes and assessments that have been paid thereon.

4. That the Plaintiff be awarded damaged in excess of $50,000 for the deprivation by Defendants of Plaintiff's rights,

privileges and immunities secured by the Constitution of the United States.

5. For all costs of suit and reasonable attorneys' fees.

6. For such other and further relief as the Court deems just and appropriate.

DATED this 28th day of January, 1991.

McDONALD, CARANO, WILSON,
McCUNE, BERGIN, FRANKOVICH &
HICKS

By /S/ JOHN FRANKOVICH
JOHN FRANKOVICH

Attorneys for Plaintiff

(Certificate of Service omitted in printing.)

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Filed 7/22/91

Attorneys for Defendant
Tahoe Regional Planning Agency

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM Plaintiff, vs. TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA, STATE OF CALIFORNIA, and the COUNTY OF WASHOE, a Political Subdivision of the STATE OF NEVADA, Defendants.	Case No. **CV-N-91-040-HDM** ANSWER TO COMPLAINT

Defendant, Tahoe Regional Planning Agency (TRPA), in answer to plaintiff's complaint herein, dated January 28, 1991, admits, denies and alleges as follows:

ANSWER TO GENERAL ALLEGATIONS

1. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the allegations of paragraphs 1, 3, 7 and 9, and for that reason, denies each and every allegation contained in said paragraphs.

2. Defendant denies each and every allegation contained in paragraph 8.

3. Answering paragraph 2, defendant denies the final sentence of said paragraph, set forth at lines 22-24 of page 2 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 2, and for that reason, denies each and every of said remaining allegations.

4. Answering paragraph 4, defendant admits the TRPA has adopted an Individual Parcel Evaluation System (IPES) which was implemented in 1989. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 4, and for that reason, denies each and every of said remaining allegations.

5. Answering paragraph 5, defendant admits the Subject Lot is located in a Stream Environment Zone ("SEZ") and that the IPES score for the Subject Lot as determined by the TRPA was zero (0). Further answering said paragraph 5, defendant denies the clause of said paragraph set forth at lines 17-18 of page 3 of the complaint which reads, "which prohibited the construction of a single-family residence." Further answering said paragraph 5, defendant denies the clause of said paragraph set forth at lines 20-22 of page 3 of the complaint which reads, "which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot." Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 5, and for that reason, denies each and every of said remaining allegations.

6. Answering paragraph 6, defendant admits plaintiff appealed the IPES score of zero to the TRPA and that this appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 29, 1990, and further admits that at that latter time, the TRPA acted to deny the plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. Defendant denies the allegations contained in the last sentence of said paragraph 6, set forth at lines 1-5 of page 4 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth

of the remaining allegations of said paragraph 6, and for that reason, denies each and every of said remaining allegations.

ANSWER TO FIRST CLAIM FOR RELIEF

7. Answering paragraph 10, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraph 2 through 9, inclusive, of the complaint.

8. Defendant denies the allegations contained in paragraphs 11 and 12.

ANSWER TO SECOND CLAIM FOR RELIEF

9. Answering paragraph 13, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

10. Defendant denies the allegations contained in paragraph 14.

ANSWER TO THIRD CLAIM FOR RELIEF

11. Answering paragraph 15, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

12. Defendant denies the allegations contained in paragraph 16.

ANSWER TO FOURTH CLAIM FOR RELIEF

13. Answering paragraph 17, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

14. Defendant denies the allegations contained in paragraph 18.

ANSWER TO FIFTH CLAIM FOR RELIEF

15. Answering paragraph 19, defendant incorporates herein by this reference, as though fully set forth, its answers to paragraphs 2 through 9, inclusive, of the complaint.

16. Answering paragraph 20, defendant denies the allegations contained in the last sentence of said paragraph set forth at lines 9-11 of page 6 of the complaint. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 20, and for that reason, denies each and every of said remaining allegations.

17. Answering paragraph 21, defendant denies plaintiff is entitled to reimbursement from TRPA of any taxes, special assessments or of any other sums whatsoever and further denies that plaintiff paid any taxes, special assessments or any other similar sums to TRPA. Defendant lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of said paragraph 21, and for that reason, denies each and every of said remaining allegations.

AFFIRMATIVE DEFENSES

As and for separate affirmative defenses, defendant alleges:

FIRST AFFIRMATIVE DEFENSE

18. Each claim for relief of plaintiff's complaint fails to state a claim upon which relief can be granted as to this answering defendant.

SECOND AFFIRMATIVE DEFENSE

19. Plaintiff has failed to exhaust available administrative remedies.

THIRD AFFIRMATIVE DEFENSE

20. Plaintiff's complaint fails to state an actual, justiciable controversy as to this answering defendant.

FOURTH AFFIRMATIVE DEFENSE

21. Plaintiff is not an aggrieved person as required by Article VI(j) of the Tahoe Regional Planning Compact.

FIFTH AFFIRMATIVE DEFENSE

22. This Court lacks jurisdiction because plaintiff's complaint is not ripe for adjudication.

SIXTH AFFIRMATIVE DEFENSE

23. Plaintiff's complaint as to this answering defendant is not ripe, and this Court thus lacks jurisdiction, because of plaintiff's failure to obtain a final decision by TRPA as to the amount of development or other uses of plaintiff's property that may be allowed by the Tahoe Regional Planning Compact and TRPA's Regional Plan and Ordinances.

SEVENTH AFFIRMATIVE DEFENSE

24. Plaintiff has waived and therefore may not assert each purported claim for relief in her complaint.

EIGHTH AFFIRMATIVE DEFENSE

25. This answering defendant is not liable or otherwise responsible for the conduct or obligations of other defendants in this action.

NINTH AFFIRMATIVE DEFENSE

26. Each claim for relief of plaintiff's complaint is time-barred as having been brought beyond the applicable statute of limitations.

TENTH AFFIRMATIVE DEFENSE

27. Each purported claim for relief of plaintiff's complaint is barred by laches or estoppel or both of them.

ELEVENTH AFFIRMATIVE DEFENSE

28. A cause of action for recovery of taxes, assessments or other fees paid to the County of Washoe, Nevada, the State of Nevada or any other entity does not lie against TRPA because TRPA did not collect or otherwise receive payment form plaintiff of any such taxes, assessments or other fees.

TWELFTH AFFIRMATIVE DEFENSE

29. TRPA cannot be ordered to allow construction of a single-family residence or any other project on the Subject Lot in the event that construction thereof is in violation of a lawful regulation of TRPA.

THIRTEENTH AFFIRMATIVE DEFENSE

30. Each claim for relief of plaintiff's complaint fails to present a concrete controversy ripe for adjudication.

WHEREFORE, this answering defendant prays that:

1. Plaintiff's complaint herein be dismissed with prejudice;

2. Plaintiff take nothing by this action;

3. Defendant recover its costs of suit and attorney's fees in this action; and

4. The Court award such other and further relief as it deems appropriate.

DATED: July 22, 1991.

Crowell, Susich, Owen, & Tackes

By: /s/Gary A. Owen
Gary A. Owen

Attorneys for Defendant
Tahoe Regional Planning Agency

(Certificate of Service by Mail omitted in printing.)

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Attorney for Plaintiff

Filed 9/16/92

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,	)	Case No.
	)	CV-N-91-040-ECR
Plaintiff,	)	
	)	**FIRST AMENDED**
vs.	)	**COMPLAINT**
	)	
TAHOE REGIONAL PLANNING AGENCY, STATE OF NEVADA	)	
	)	
Defendants.	)	
	)	

Plaintiff, BERNADINE SUITUM, as and for a claim for relief against the above-named Defendants, alleges as follows:

I

JURISDICTION

1. This is an action claiming the invalidity of certain ordinances and regulations adopted by the TAHOE REGIONAL PLANNING AGENCY ("TRPA") and the invalidity of certain actions taken by the TRPA pursuant thereto or, in the alternative, that said regulations and actions constitute an improper taking of the Plaintiff's property and are in violation of Plaintiff's civil rights. Jurisdiction is based on 28 U.S.C. 1331, with Federal Questions arising under the Tahoe Regional Planning Compact

between California and Nevada, Pub.L.No. 91-148, 83 Stat. 360 (1969), Amended, Pub.L. 96-551, 94 Stat. 3233; N.R.S. § 277.190 et seq., and the Fifth and Fourteenth Amendments of the United States Constitution. Jurisdiction is also based on 28 U.S.C. 1343, in that Plaintiff claims that Defendant's acts are in violation of her civil rights as provided in 42 U.S.C. 1983.

II

GENERAL ALLEGATIONS

2. In 1972, the Plaintiff Acquired a residential subdivision lot identified as Lot 15, Block K, Washoe County Assessor's Parcel No. 130-211-31, in the Mill Creek Subdivision located in Incline Village, Washoe County, Nevada (hereinafter referred to as "Subject Lot"). Since that time, it has been and continues to be the intent and purpose of the Plaintiff to construct a single-family residence on the Subject Lot. Due to a variety of circumstances, including an unfortunate illness and subsequent death of her husband, the Plaintiff was not in a position to undertake the construction of a home on the Subject Lot until very recently. Because of the action taken by Defendant TAHOE REGIONAL PLANNING AGENCY (hereinafter referred to as "TRPA"), as more fully described below, the Plaintiff has been denied that right.

3. Since 1972, the Plaintiff has paid all taxes and assessments for the Subject Lot, including utility fees and public improvement assessments. The Mill Creek Subdivision is substantially built out. The Subject Lot is one of the few undeveloped lots within the subdivision. The Subject Lot is surrounded on three (3) sides by existing houses and on the fourth side by an improved street containing all utilities to service the Subject Lot.

4. The TRPA has adopted an Individual Parcel Evaluation System ("IPES") which was implemented in 1989. Prior to the adoption of IPES, the Subject Lot had been classified as Land Capability No. 6 which would allow for the construction of a residence.

5. In 1989, Plaintiff applied for and received a Residential Allocation from the COUNTY OF WASHOE for the construction of a house on the Subject Lot. Subsequent to obtaining the

Residential Allocation and in accordance with the terms thereof, Plaintiff attempted to submit building plans for a single-family detached dwelling unit to the TRPA for approval. After submitting these building plans the TRPA conducted a field verification, the results of which designated the Subject Lot as being located in a Stream Environment Zone ("SEZ") which prohibited the construction of a single-family residence. The TRPA also conducted an IPES review of the Subject Lot. The IPES score for the Subject Lot as determined by the TRPA was zero (0) which under the TRPA's Ordinances prohibits the construction of a single-family residence or any other use of the Subject Lot.

6. Plaintiff appealed the field verification which classified the Subject Lot as "SEZ" and the IPES score of 0 to the TRPA. These appeals were combined into a single appeal process. This appeal was heard by the TRPA initially on August 22, 1990, and subsequently on November 27, 1990. At that time, the TRPA acted to deny the Plaintiff's appeal and upheld the IPES score on the grounds that the Subject Lot was located in a Stream Environment Zone. The effect of the determination of the TRPA was to deny the Plaintiff the right to construct a home on the Subject Lot, thereby depriving her of all reasonable and economically viable use of the Subject Lot.

7. The TRPA was created by the States of Nevada and California and acts under the authority granted to the TRPA by those States. The States of California and Nevada have delegated regulatory powers, including the police power of land use regulation of private property, to the TRPA for lands located within the Tahoe Basin. In addition, Nevada and California provide the funding for the operation and maintenance of the TRPA. The States of Nevada and California are responsible for the actions of the TRPA.

8. Plaintiff has exhausted all reasonable available administrative remedies.

9. It has been necessary for the Plaintiff to retain counsel for the prosecution of this matter and in addition to all other relief requested hereunder the Plaintiff is entitled to an award of reasonable attorneys' fees.

III

FIRST CLAIM FOR RELIEF

10. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

11. The action taken by the TRPA in denying Plaintiff the right to construct a residence of the Subject Lot is arbitrary, capricious, unlawful and does not protect any legitimate public interest and is, therefore, an improper exercise of police power.

12. The action taken by the TRPA with respect to the Subject Lot should be declared invalid, and the TRPA should be ordered to allow Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

IV

SECOND CLAIM FOR RELIEF

13. Plaintiff incorporates by reference all of the general allegations set forth in Paragraphs 2 through 9.

14. The action taken by the TRPA as applied to Plaintiff and the Subject Lot is unconstitutional in violation of the Fifth and Fourteenth Amendments of the United States Constitution and should thereby be declared invalid.

V

THIRD CLAIM FOR RELIEF

15. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

16. The action taken by the TRPA constitutes a taking of Plaintiff's property in violation of the Fifth and Fourteenth Amendments of the United States Constitution for which Plaintiff is entitled to just compensation in excess of $50,000.

VI

FOURTH CLAIM FOR RELIEF

17. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

18. The action taken by the TRPA was under the color of state law of the States of California and Nevada and the TRPA Compact and deprived the Plaintiff of her rights, privileges and

immunities secured by the Constitution of the United States, and as a result thereof, Defendants and each of them are liable to Plaintiff for damages in excess of $50,000.

VII

FIFTH CLAIM FOR RELIEF

19. Plaintiff incorporates by reference all of the General Allegations set forth in Paragraphs 2 through 9.

20. Since acquiring the Subject Lot in 1972, Plaintiff has paid property taxes and special assessments to Defendant, WASHOE COUNTY. Because Plaintiff has been denied the use of here property, Plaintiff and the Subject Lot have been denied the benefits to be derived from the payments of assessments and taxes.

21. Plaintiff is entitled to reimbursement of all taxes and special assessment paid to Defendants, WASHOE COUNTY, the STATE OF NEVADA and the TRPA.

WHEREFORE, Plaintiff prays for relief as follows;

1. That the Court declare that the action taken by the TRPA denying the Plaintiff the right to build on the Subject Lot is invalid and unlawful.

2. That the TRPA be ordered to permit Plaintiff to proceed with the construction of a single-family residence on the Subject Lot.

3. That the Plaintiff be awarded damages for the taking of her property without due process of law, including damages for the fair market value of the Subject lot taken and all taxes and assessments that have been paid thereon.

4. That the Plaintiff be awarded damages in excess of $50,000 for the deprivation by Defendants of Plaintiff's rights, privileges and immunities secured by the Constitution of the United States.

5. For all costs of suit and reasonable attorneys' fees.

6. For such other and further relief as the Court deems just and appropriate.

DATED this 9th day of September, 1992.

/S/WM. PATTERSON CASHILL
WM. PATTERSON CASHILL, ESQ.

Attorney for Plaintiff

(Certificate of Service by Mail omitted in printing.)

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Attorneys for Defendant
Tahoe Regional Planning Agency

Filed 9/15/93

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BERNADINE SUITUM, Plaintiff, v. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA, Defendants.	**CASE NO. CV-N-91-040-ECR** AFFIDAVIT OF SUSAN E. SCHOLLEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss.
CARSON CITY)

Susan E. Scholley, being first duly sworn, on oath and under penalty of perjury, deposes and says:

1. I am the Special Projects Attorney of defendant Tahoe Regional Planning Agency (TRPA). In that capacity, I am a member of the TRPA staff. I have personal knowledge of the matters hereinafter stated and could competently testify to same if called as a witness for that purpose.

2. I have reviewed, and am familiar with, TRPA environmental and planning documents pertaining to TRPA's 1984 Plan and 1987 Plan. Those documents include, but are not limited to, the Environmental Impact Statement for the 1984 and 1987. Plans, the Goals and Policies for the 1987 Plan and the TRPA Code of Ordinances implementing the 1987 Plan.

3. I have also reviewed, and am familiar with, all TRPA administrative files and records pertaining to plaintiff Bernadine Suitum.

4. Attached hereto and incorporated herein by this reference, as exhibits to this Affidavit, are true and correct copies of the following documents, which documents are public records of the TRPA and bear the following respective exhibit letters:

EXHIBIT A -- Pages 75, 76 and 77 of the document entitled, "Environmental Impact Statement For Adoption of A Regional Plan For The Lake Tahoe Basin, Tahoe Regional Planning Agency, February 1983 ";

EXHIBIT B -- Pages IV-23 through IV-25, VII-3 through VII-8, and VII-14 through VII-17 of the document entitled, "Regional Plan For The Lake Tahoe Basin, Goals And Policies, Tahoe Regional Planning Agency, September 17, 1986";

EXHIBIT C -- Excerpts of Chapter 20 (pp . 20-8 through 20-27), Chapter 34 (pp. 34-1 through 34-6), and Chapter 37 (pp. 37-9 through 37-16) of the document entitled "Regional Plan For The Lake Tahoe Basin, Code of Ordinances And Rules of Procedure, Tahoe Regional Planning Agency".

5. I have reviewed TRPA's administrative files and records concerning Plaintiff Bernadine Suitum, and said files and records contain no application to TRPA by Mrs. Suitum to transfer either a residential development right or a residential allocation pursuant to Chapter 34 of the TRPA Code of Ordinances or an application to transfer land coverage pursuant to Chapter 20 of the Code of Ordinances.

6. TRPA has never levied or collected from Plaintiff Bernadine Suitum or any other owner of real property within the Lake Tahoe Basin special assessments or taxes for purposes of public improvements within the Basin.

Executed at Carson City, Nevada, on September 9, 1993.

/s/ Susan E. Scholley
Susan E. Scholley,
Special Projects Attorney

Subscribed and Sworn to Before me
this 9th day of September, 1993.

/s/ LAUREN ARENDS
Notary Public

(Certificate of Service by Mail omitted on printing.)

EXHIBIT A TO SCHOLLEY AFFIDAVIT

STREAM ENVIRONMENT ZONES

Stream environment zones comprise only a small portion of the Basin but they perform a variety of natural functions critical to the needs of wildlife, the maintenance of water quality, and others. The role of SEZ's in the cleansing of runoff is integral to the achievement of regional water quality goals and standards.

CURRENT SITUATION

The stream environment and related hydrologic zone is the area directly influenced by and including the presence of streams or near surface groundwater. The stream environment zone (SEZ) is delineated by the presence of meadows, marshes, water courses, drainage ways, and flood plains and riparian vegetation or a buffer strip parallel to the stream course which maintains the integrity and hydrologic function of the SEZ. The buffer is based on the stream order with the largest streams having a 100' buffer, smaller streams with 50', and minor streams having 25' buffers.

The riparian vegetation associated with SEZ's provides critical wildlife habitat throughout the Tahoe Basin. The edge effect created by the riparian vegetation and the coniferous forest is especially critical to wildlife. The SEZ's also enhance visual quality in the Basin. The soils of the SEZ are generally very productive and support a wide diversity of plant species. The riparian vegetation of the SEZ is important for many other reasons in the Tahoe Basin including treatment of runoff and maintenance of soil stability.

SEZ's are capable of conveying both surface and subsurface runoff to Lake Tahoe while removing nutrients and sediments. The capacity of a restored SEZ to treat surface runoff is shown in Table 8. A study by the U.S. Environmental Protection Agency (1980) found that SEZ's in the Tahoe Basin are effective for removing nutrients and sediments from surface runoff. Preliminary data from the U.S. Forest Service watershed restoration project at the Jennings Casino site support this information.

Table 8. Effectiveness of watershed restoration at the Jennings Casino Site.[a]

Station	Suspended Solids mg/l n[b]	Suspended Solids mg/l $\bar{x}$[c]	Total nitrogen as N mg/l n	Total nitrogen as N mg/l $\bar{x}$	Phosphate as P mg/l n	Phosphate as P mg/l $\bar{x}$	Iron mg/l n	Iron mg/l $\bar{x}$
Above	30	493	18	1.424	28	0.982	20	1.060
Midway	8	162	8	0.300	8	0.019	8	0.706
Below	20	29	10	0.395	18	0.141	16	0.300
Percent reduction in concentration		94		73		86		72

[a] Source: TRPA, 1977.
[b] n = number of samples
[c] $\bar{x}$ = average value

RELATIONSHIPS TO THRESHOLDS

Stream environment zones are 'valuable' in the sense of their ability to cleanse runoff, provide wildlife habitat, enhance scenic quality, and protect the soil resource. Because of these and other qualities, an environmental threshold was established for SEZ's. The threshold is basically a nondegradation standard that also includes provisions for restoring disturbed SEZ's.

MANAGEMENT DIRECTION

The Tahoe Regional Planning Agency is the lead Agency for water quality planning in the Basin. The Lake Tahoe Water Quality Management Plan is implemented through TRPA Ordinance No. 81-5. Section 13.10 of that ordinance states that . . . "no person shall perform any grading, clearing, removal of vegetation, filling, or creation of land coverage, within or upon a stream environment zone ("SEZ"), as described or depicted upon maps contained in the Plan."

LIMITATIONS AND POTENTIAL

Stream Environment Zones have been significantly disturbed, altered, or modified since the 1960's. Less than 7% of the total land area in the Basin is now made-up of riparian

vegetation. Recent figures show that there are 17,718 acres of SEZ and of that total, 2,466 acres have been built on or disturbed in some manner. Potential for restoration is likely less than 1,483 acres.

CULTURAL

For the purposes of this document, cultural refers to historical and archaeological aspects of the region.

CURRENT SITUATION

The Lake Tahoe region was first inhabited by small groups of Washoe Indians who wandered in summer along traditional routes in search of food, returning occasionally to small encampments along eastward flowing streams.

The earliest written description of the Washoe Tribe's contact with U.S. explorers was made by John C. Fremont in his expedition notes of January 24, 1844. Twenty-one days later, February 14, 1844, Fremont also recorded the earliest sighting of Lake Tahoe by a U.S. explorer.

Early permanent settlement in the Tahoe Basin was sparse until 1859, when the Comstock mining activities in Nevada started a boom along the "Bonanza Road" from California. Trading posts, way stations, inns, fishing boat-, dairy farms, ranching headquarters and lumber operations all played an essential role in Lake Tahoe's development. For the remainder of the century, mountain men, ranchers, immigrants, steamer captains, cowboys, innkeepers, commercial fishermen, loggers and scores of other struggled to carve out an existence.

From the late 1880's, and for the next 50 years, the Lake Tahoe region served as a recreational playground for the well-to-do. The pace of development along the lakeshore was slow, with only a few large estates and several family oriented resorts. The pattern of subdivision and development of Tahoe land began shortly after World War II, when large numbers of vacationers with more leisure time came to this area because of its scenic beauty, outdoor recreation, and gambling. The combination of these three features provided a wide range of recreational opportunities within easy distance of growing population centers. The ski industry emerged in the mid-1950's and made Lake Tahoe one of America's all-year playgrounds.

EXHIBIT B TO SCHOLLEY AFFIDAVIT

STREAM ENVIRONMENT ZONE

Stream environment zones (SEZs) and related hydrologic zones consist of the natural marsh and meadowlands, watercourses and drainage ways, and floodplains which provide surface water conveyance from upland areas into Lake Tahoe and its tributaries. Stream environment zones are determined by the presence of riparian vegetation, alluvial soil, minimum buffer strips, water influence areas, and floodplains. The plant associations of stream environment zones constitute only a small portion of the Basin's total land area, but are perhaps the single most valuable plant communities in terms of their role in providing for wildlife habitat, purification of water, and scenic enjoyment. Protection and restoration of stream environment zones are essential for improving and maintaining the environmental amenities of the Lake Tahoe Basin and for achieving environmental thresholds for water quality, vegetation preservation, and soil conservation.

GOAL #1 PROVIDE FOR THE LONG-TERM PRESERVATION AND RESTORATION OF STREAM ENVIRONMENT ZONES.

The preservation of SEZs is a means for achieving numerous environmental thresholds. Policies that promote their maintenance, protection, and restoration are listed below.

POLICIES

1. RESTORE ALL DISTURBED STREAM ENVIRONMENT ZONE LANDS IN UNDEVELOPED, UNSUBDIVIDED LANDS, AND RESTORE 25 PERCENT OF THE SEZ LANDS THAT HAVE BEEN DISTURBED, DEVELOPED, OR SUBDIVIDED.

   Many acres of SEZ lands have been modified or disturbed. TRPA shall identify the number of acres to be restored and prepare a list of projects to achieve the environmental threshold carrying capacity for stream environment zones. TRPA shall develop an implementation program to restore the necessary acreage, and establish an annual tracking program. The implementation on program shall provide for restoration

over a twenty year period, with 90 percent of the acreage to be restored within the first fifteen years.

2. SEZ LANDS SHALL BE PROTECTED AND MANAGED FOR THEIR NATURAL VALUES.

   SEZ lands and associated riparian vegetation are scarce in the Basin relative to other plant communities. Because SEZs provide many beneficial functions (especially pertaining to water quality) only forest management practices, stream improvement programs, and habitat restoration projects are permissible uses.

3. GROUND WATER DEVELOPMENT IN SEZ LANDS SHALL BE DISCOURAGED WHEN SUCH DEVELOPMENT COULD POSSIBLY IMPACT ASSOCIATED PLANT COMMUNITIES OR INSTREAM FLOWS.

   Withdrawal of water from SEZ lands may lower surface and ground waters and, by so doing, alter plant composition of the riparian vegetation and reduce instream flows. Groundwater proposals in SEZs and riparian plant communities will be evaluated against those concerns.

4. GOLF COURSES IN STREAM ENVIRONMENT ZONES SHALL BE ENCOURAGED TO RETROFIT COURSE DESIGN IN COMBINATION WITH FERTILIZER APPLICATION STANDARDS (SEE WATER QUALITY SUBELEMENT, GOAL #1 POLICY 5) TO PREVENT RELEASE OF NUTRIENTS TO ADJOINING GROUND AND SURFACE WATERS.

   A combination of strategies to include fertilizer application standards and course redesign may be necessary to control off-site nutrient release from golf course fairways and greens.

5. NO NEW LAND COVERAGE OR OTHER PERMANENT LAND DISTURBANCE SHALL BE PERMITTED IN STREAM ENVIRONMENT ZONES EXCEPT FOR THOSE USES AS NOTED IN A, B, C, D, AND E BELOW:

   A. PUBLIC OUTDOOR RECREATION FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS A NECESSARY PART OF A PUBLIC AGENCY'S LONG RANGE PLANS FOR PUBLIC OUTDOOR

RECREATION, (2) THE PROJECT IS CONSISTENT WITH THE RECREATION ELEMENT OF THE REGIONAL PLAN; (3) THE PROJECT, BY ITS VERY NATURE, MUST BE SITED IN A STREAM ENVIRONMENT ZONE; (4) THERE IS NO FEASIBLE ALTERNATIVE WHICH WOULD REDUCE THE EXTENT OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES; (5) THE IMPACTS ARE FULLY MITIGATED; (6) STREAM ENVIRONMENT ZONE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM ENVIRONMENT ZONE WHICH IS DISTURBED OR DROOPED BY THE PROJECT.

To the fullest extent possible, recreation facilities must be sited outside of stream environment zones. Some recreation facilities, such ma river access points or stream crossings for hiking trails, by their very nature require some encroachment of stream environment zones. However, the six-part test established by this policy allows encroachment of SEZs where such encroachment is essential for public outdoor recreation and precautions are taken to ensure that stream environment zones are protected to the fullest extent possible. The restoration requirements of this policy can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provision. else where in this Plan.

B. PUBLIC SERVICE FACILITIES ARE PERMISSIBLE USES IN STREAM ENVIRONMENT ZONES IF: (1) THE PROJECT IS NECESSARY FOR PUBLIC HEALTH, SAFETY, OR ENVIRONMENTAL PROTECTION; (2) THERE IS NO REASONABLE ALTERNATIVE, INCLUDING SPANS, WHICH AVOIDS OR REDUCES THE EXPAND OF ENCROACHMENT IN STREAM ENVIRONMENT ZONES; (3) TOE IMPACTS ARE FULLY MITIGATED; AND (4) STREAM ENVIRONMENT ZONE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM

ENVIRONMENT ZONE WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

Development within stream environment zones is not consistent with the goal of managing stream environment zones for their natural qualities and shall generally be prohibited except under extraordinary circumstances involving public works. Each circumstance shall be evaluated based on the of this policy can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provisions else where in this Plan.

C. PROJECTS WHICH REQUIRE ACCESS ACROSS STREAM ENVIRONMENT ZONES TO OTHERWISE BUILDABLE SITES ARE PERMISSIBLE IN SEZs IF: (1) THERE IS NO REASONABLE ALTERNATIVE, WHICH AVOIDS OR REDUCES THE EXTENT OF ENCROACHMENT IN THE SEZ, (2) THE IMPACTS ARE FULLY MITIGATED, AND (3)SEE LANDS ARE RESTORED IN THE AMOUNT OF 1.5 TIMES THE AREA OF STREAM ENVIRONMENT ZONE WHICH IS DISTURBED OR DEVELOPED BY THE PROJECT.

The restoration requirements can be accomplished on-site or off-site, and shall be in lieu of any coverage transfer or coverage mitigation provisions else where in this Plan.

D. NEW DEVELOPMENT MAY BE PERMITTED IN MAN-MODIFIED STREAM ENVIRONMENT ZONES WHERE: (1) THE AREA NO LONGER EXHIBITS THE CHARACTERISTICS OF A STREAM ENVIRONMENT ZONE; (2) FURTHER DEVELOPMENT WILL NOT EXACERBATE THE PROBLEMS CAUSED BY DEVELOPMENT IN STREAM ENVIRONMENT ZONES; (3) RESTORATION IS INFEASIBLE; AND (4) MITIGATION IS PROVIDED TO AT LEAST PARTIALLY OFFSET THE LOSSES WHICH WERE

CAUSED BY MODIFICATION OF THE STREAM ENVIRONMENT ZONES.

E. STREAM ENVIRONMENT ZONE RESTORATION PROJECTS AND EROSION CONTROL PROJECTS.

6. REPLACEMENT OF EXISTING COVERAGE IN STREAM ENVIRONMENT ZONES MAY BE PERMITTED WHERE THE PROJECT WILL REDUCE IMPACTS ON STREAM ENVIRONMENT ZONES AND WILL NOT IMPEDE RESTORATION EFFORTS.

Existing structures in stream environment zones may be repaired or rebuilt. Minor reconstruction may be permitted so long as drainage imp m cements, protection of the stream environment zone from disturbances, or other measures are carried out which provide a net benefit to the area's capacity to serve as a naturally-functioning stream environment zone. Major reconstruction or replacement may also be permitted if there is a net benefit to the stream environment zone and if the replacement or reconstruction is consistent with stream environment zone restoration programs (see Policy 1).

7. THE PROCEDURES FOR STREAM ENVIRONMENT ZONE IDENTIFICATION SHALL BE UPDATED.

The Handbook of Best Management Practices establishes a procedure for delineating stream environment and related hydrologic zones. This procedure shall be reviewed and revised pursuant to the recommendations of the Individual Parcel Evaluation technical team. These revisions shall become effective on January 1, 1989. This review and update of the Handbook of Best Management Practices shall include consideration of the procedures to be followed for artificial drainage ways and man-modified stream environment zones.

DEVELOPMENT AND IMPLEMENTATION PRIORITIES

The Development and Implementation Priorities Subelement coordinates the implementation provisions and time schedules of each Plan Element to achieve and maintain adopted environmental thresholds. To provide for effective management of the Region's resources and attain environmental thresholds, three factors must be considered and planned carefully. First, the feasible rate for

correcting or mitigating existing resource utilization problems will determine how rapidly improvements in environmental quality will take price. Second, the rate and type of new development will absorb or negate some of the progress made toward environmental goals and standards. Third, uncertainty exists regarding the effectiveness of water quality BMPs and programs to reduce vehicle miles traveled.

As an illustration of these factors, reductions in nutrient loads to Lake Tahoe from remedial programs will improve water quality only if remedial measures keep pace with new loads from land coverage and disturbance permitted by the Plan. The timing and phasing of both new development and remedial measures must, therefore, be carefully linked to ensure steady progress toward the environmental thresholds. If BMPs prove to be less effective than originally thought, further adjustments to development and remedial priorities will be required. The Monitoring and Evaluation Subelement identifies study needs for determining the effectiveness of control strategies.

The Plan also must provide incentives for correcting existing problems within the Region. Properly structured incentives can provide for broader participation in meeting regional goals and expedite desired improvements.

GOAL #1 DIRECT ALL RESIDENTIAL DEVELOPMENT FIRST TO THOSE AREAS MOST SUITABLE FOR DEVELOPMENT IN ACCORDANCE WITH ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES AND OTHER CONSIDERATIONS, SUCH AS INFRASTRUCTURE CAPACITY AND PROGRESS TOWARD ACCOMPLISHING WATER QUALITY IMPROVEMENT PROGRAMS.

POLICIES

1. UPON ADOPTION OF THIS PLAN, EVALUATION AND RANKING OF ALL VACANT RESIDENTIAL PARCELS UNDER AN INDIVIDUAL PARCEL EVALUATION SYSTEM (IPES) SHALL BE UNDERTAKEN AND COMPLETED BY DECEMBER 31, 1988. COMMENCING ON

JANUARY 1, 1989, NEW SINGLE-FAMILY DWELLING CONSTRUCTION SHALL BE EVALUATED IN ACCORDANCE WITH IPES. THIS SYSTEM SHALL RANK ALL VACANT RESIDENTIAL PARCELS WITH RESPECT TO THEIR RELATIVE ENVIRONMENTAL SUITABILITY FOR DEVELOPMENT.

REVIEW OF PROJECTS UNDER IPES SHALL NOT COMMENCE UNTIL ALL PARCELS HAVE BEEN EVALUATED AND RANTED IN ACCORDANCE WITH IPES. THE STANDARDS SET FORTH IN GOAL #1, POLICY 2, OF THIS SUBELEMENT SHALL APPLY UNTIL IMPLEMENTATION OF IPES. NEW RESIDENTIAL CONSTRUCTION SHALL BE SUBJECT TO THE ALLOCATION LIMITS SET FORTH IN GOAL #2, POLICY 2 OF THIS SUBELEMENT.

A. IPES is an objective and scientific system based on the report entitled Individual Parcel Evaluation System (1986), which evaluates relative environmental suitability for development. IPES shall evaluate each parcel with respect to the criteria listed below. Details of ICES, including a rating system, shall be included in implementing ordinances.

1) Relative erosion hazard (soil erodability, slope-length and gradient, climatic conditions, surface roughness and mass wasting).

2) Runoff potential (depth to seasonal high water table, percolation rate, permeability and depth to very slowly permeable layer).

3) Degree of difficulty to access building site (amount of excavation and soil disturbance required to provide minimum driveway and parking area and degree of difficulty for excavation due to soil properties).

4) Water influence areas (proximity to and extent of disturbance in water influence areas).

5) Condition of watershed (extent to which watershed and intervening drainage areas conform to land coverage allowances set forth in the land capability

system, hydrologic characteristics and known sediment/nutrient production).

6) Ability to revegetate (climatic conditions and the available water holding capacity, fertility, texture, drainage and permeability of the soil).

7) Need for water quality improvements in vicinity of parcel (stable roadside drainage channels, storm drainage system and stable cut and fill slopes).

B. IPES shall include an element, separate from the criteria used for rating each parcel, to encourage physical mitigation of existing water quality problems by individual property owners. The rating of a parcel may be increased, to a limited and finite degree, by the property owner constructing off-site water quality improvements. The extra consideration for off-site work shall result in benefits that fully offset the difference in impacts between developing the subject parcel and developing a parcel with a rating equivalent to the subject parcel's rating without applying the bonus.

C. IPES shall be implemented by ordinance consistent with the following:

1) A team of experts shall evaluate each vacant residential parcel using a standardized approach in accordance with IPES.

a) For parcels of 1/3 acre or less in size, the entire parcel shall be evaluated for purposes of establishing the ICES rating, except in cases where the parcel contains an SEZ. SEZs shall be excluded from the area evaluated. For parcels with less than 5,000 square feet outside an SEZ, the ICES rating shall be reduced by a factor equal to the ratio of land available for construction to 5,000 square feet (See Goal #1, Policy 2, SEZ Subelement).

b) For parcels greater than 1/3 acre but less than 5 acres in size, the evaluation team shall select and evaluate the 1/3 acre portion of the parcel that results in the highest rating. If the selected 1/3

acre portion contains an SEZ, the procedure set forth in (a) above shall be followed. If the property owner wishes to locate the residence outside the area evaluated, a reevaluation shall be required of the 1/3 acre portion of the parcel containing the desired building site.

c) For parcels of 5 acres or greater in size, the property owner shall be notified and asked to identify the desired building site. Once a building site has been identified, the evaluation team shall evaluate the best 1/3 acre portion of the parcel containing the identified building site. If this 1/3 acre contains an SEZ, the procedures set forth in (a) above shall be followed.

d) Installation of water quality improvements in the vicinity of a parcel, subsequent to the initial rating, may increase the rating of a parcel. The amount of increase shall depend on the weight given that factor in IPES and the degree of water quality improvement.

e) Changes in the condition of a watershed, subsequent to the initial rating, may change the rating of parcels located in that watershed. me amount of change in the rating shell depend on the weight given that factor in IPES. Such changes in the condition of a watershed may comae the initial rating to increase or decrease.

f) The rating of all parcels shall be based on the Gumption that when developed, all required BMPs shall be installed and maintained.

g) Property owners may appeal parcel ratings to an independent body of qualified experts not involved in the original field evaluation of that particular parcel. These independent experts shall then apply the criteria established in IPES. The decision of the independent body shall be deemed the final action of the Agency unless the property owner appeals the decision to the Governing Board. The Governing Board may

change the rating of a parcel only upon expressly finding, based on substantial evidence in the record. that the criteria established in the IPES were not applied correctly.

2) TRPA shall rate all vacant residential parcels numerically and then rank them from the most suitable to the leant suitable by jurisdiction. TRPA may reconsider the rating upon request before the rankings are officially adopted except as otherwise provided in (d) and (e) above.

3) The Agency shall establish a level in the numerical ranking immediately above the most sensitive parcels, based on recommendations from a technical committee.

4) All vacant residential parcels may compete for building allocations. Those above the initial level, referred to in 3) above, and as may be adjusted in accordance with 5) below, shall comprise the top rank and, if receiving an allocation, may pursue a permit. Those below that level, if receiving an allocation, may exercise the options listed below:

   a) transfer the allocation in accordance with policies in Goal #3 of this Subelement.

   b) relinquish the allocation and wait for the level to drop to include the parcel within the top rank.

   c) transfer other development rights as permitted elsewhere in the Plan.

5) The numerical level defining the top rank for any jurisdiction shall be lowered on an annual basis by the number of allocations utilized in that jurisdiction during the previous year, provided that:

   a) all parcels included in the top rank are otherwise eligible for development under the applicable state water quality management plans for the Lake Tahoe Basin and other legal limitations,

   b) a monitoring program for that jurisdiction is in place in accordance with the Monitoring and Evaluation Subelement;

   c) demonstrable progress is being made on capital improvement programs for water quality within that jurisdiction (see Monitoring and Evaluation Subelement) ;

   d) there is a satisfactory rate of reduction in the inventory of vacant sensitive parcels. The IPES line shall not move down in any jurisdiction unless the number of parcels below the IPES line in that jurisdiction, compared to the number that were deemed sensitive on January 1, 1986, does not exceed the following percentages.

El Dorado	20%
Placer	20%
Douglas	33%
Washoe	33%

   e) the level of compliance with conditions of project approvals within that jurisdiction is satisfactory;

6) Where an allocating authority does not use a random allocation system for IPES allocations after December 31, 1988, its allocations to parcels which are ranked below the line existing on January 1, 1989 may not exceed the number of allocations which would otherwise occur if chosen by a random system.

7) Allowable land coverage for parcels evaluated under IPES shall be a function of the parcel's IPES rating as set forth in Goal #3, Policy 1.C. of the Land Use Subelement.

2. THRU DECEMBER 31, 1988, UNTIL THE INDIVIDUAL PARCEL EVALUATION SYSTEM IS IMPLEMENTED, AN INTERIM SYSTEM SHALL BE UTILIZED FOR REVIEW OF VACANT RESIDENTIAL P EXCELS, SUBJECT TO THE ALLOCATION LIMITS SET FORTH IN GOAL #2, POLICY 2 OF THIS SUBELEMENT.

   A. The following categories of projects shall be eligible to receive a residential permit, provided that, to be eligible under categories 1), 2) or 3), parcels shall, consistent with

the Bailey coefficients, contain sufficient high-capability (land capability districts 4-7) land so that at least 1,200 square feet of impervious surface area can be created on the parcel; and shall be served by at least three of the services listed in Policy 3:

1) Parcels in California with 1983 allocations.

2) Parcels with Placer County permits which were extended by ordinance to August 1, 1986, have expired CTRPA/TRPA permits, and have not commenced construction.

3) Parcels with local county building permits which were issued prior to December 19, 1980, have been continuously renewed, and have not commenced construction.

4) Projects which received TRPA conditional approval prior to August 27, 1983, but which did not receive a TRPA permit prior to May 1, 1984, shall be permitted to proceed under the original conditions of approvals.

B. If not eligible to be processed under A. above, to be eligible to obtain a permit under the interim system, a parcel must meet the criteria set forth below as determined by Agency staff, baaed on field review:

1) The parcel contains sufficient land in Land Capability Districts 4, 5, 6 and 7, so that a single family dwelling and all related land coverage may be constructed in accordance with Agency development standards; and

2) The parcel is served by a paved road, water service utilities, sewer service utilities, and electrical utilities pursuant to Policy 3 below; and

3) The development of the parcel shall not require disturbance or land coverage in land capability districts 1a, 1b SEZ, 1c, 2, and 3, except as provided in Goal #1, Policy 5c, SEZ Subelement; and

4) The parcel shall otherwise be eligible for development under this Plan.

5) Ordinances shall set forth provisions for the waiver of the paved road criteria.

C. If a parcel receiving an allocation is determined to be ineligible for a permit under A. or B. above, the owner may, within applicable time limits set forth in implementing ordinances

1. relinquish the allocation;

2. transfer the allocation to a parcel which is eligible for development in Land Capability Districts 4-7, provided the parcel from which the allocation is transferred is retired in accordance with Goal #3, Policy 4 of this Subelement;

3. combine one or more adjacent parcels in order to meet the criteria in B. above;

4. appeal to the TRPA Governing Board and demonstrate that the parcel meets the criteria in A. or B. above; or

5. transfer other development rights in accordance with Goal #3 of this Subelement.

D. For parcels located in Tyrolian Village Units #1-5, for which complete applications were filed and accepted pursuant to the "Agreement Between The Tyrolian Village Association, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983, an interim system shall be developed and implemented by ordinance.

3. TO APPROVE A PROJECT ON A PARCEL RATED AND RANKED BY IPES THE PARCEL MUST BE SERVED BY PAVED ROAD, WATER SERVICE, SEWER SERVICE AND ELECTRIC UTILITY. ORDINANCES SHALL SET FORTH PROVISIONS FOR THE WAIVER OF THE PAVED ROAD CRITERIA.

GOAL #2 MANAGE THE GROWTH OF DEVELOPMENT CONSISTENT WITH PROGRESS TOWARD MEETING ENVIRONMENTAL THRESHOLDS.

POLICIES

1. IN 1992 AND EVERY FIVE YEARS THEREAFTER, TRPA SHALL CONDUCT AN INDEPTH REEVALUATION OF THIS PLAN IN COMPARISION WITH PROGRESS TOWARD MEETING THE ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES.

GOAL #3 ENCOURAGE CONSOLIDATION OF DEVELOPMENT THROUGH SEPARATE TRANSFER OF DEVELOPMENT RIGHTS AND TRANSFER OF LAND COVERAGE PROGRAMS.

POLICIES

1. TRANSFERS OF RESIDENTIAL DEVELOPMENT RIGHTS TO PARCELS IN AREAS DESIGNATED AS RECEIVING AREAS IN PLAN AREA STATEMENTS MAY BE PERMITTED. THE NUMBER OF DEVELOPMENT RIGHTS THAT MAY BE TRANSFERRED IS LIMITED TO ONE UNIT FOR UNDEVELOPED PARCELS, OR TO THE NUMBER OF RESIDENTIAL UNITS EXISTING ON A DEVELOPED PARCEL.

   A. RESIDENTIAL DEVELOPMENT RIGHTS MAY BE TRANSFERRED WITH APPROVAL OF TRPA. RESIDENTIAL DEVELOPMENT RIGHTS TRANSFERRED FROM UNDEVELOPED PARCELS MAY ONLY BE EXERCISED ON A RECEIVING PARCEL, UPON RECEIVING A RESIDENTIAL ALLOCATION IN ACCORDANCE WITH THE PROVISIONS REGARDING THOSE ALLOCATIONS.

   B. AS PROVIDED IN GOAL #2 OF THIS SUBELEMENT AND GOAL #2 OF THE LAND USE SUBELEMENT, UP TO 1,600 BONUS UNITS MAY BE GRANTED TO PARCELS FOR MULTI-RESIDENTIAL UNITS IN CONJUNCTION WITH TRANSFER OF DEVELOPMENT RIGHTS FROM OTHER PARCELS OR OZARK AGENCY INCENTIVE PROGRAMS. ORDINANCES SHALL ESTABLISH DETAILED PROVISIONS WHICH SHALL PROVIDE FOR BONUSES OF VARYING AMOUNTS IN RELATION TO A RIGHT TRANSFERRED OR IMPLEMENTION

OF AN AGENCY INCENTIVE PROGRAM, DEPENDING ON THE PUBLIC BENEFITS BEING PROVIDED BY THE PROJECT. MORE BONUSES SENT BE GRANTED FOR PROJECTS WITHIN COMMUNITY PLANS THAN FOR THOSE OUTSIDE CPs. OTHER BENEFITS TO CONSIDER SHALL INCLUDE THE EXTENT OF COVERAGE PLANNED, TRANSPORTATION IMPROVEMENTS, WATER QUALITY IMPROVEMENTS, AND SCENIC IMPROVEMENTS. MORE BONUSES SHALL BE GRANTED FOR PROJECTS DESIGNED TO HOUSE LOCAL RESIDENTS AT MEDIAN INCOME OR BELOW.

2. TRANSFERS OF EXISTING TOURIST ACCOMMODATION UNITS INTO DESIGNATED AREAS MAY BE PERMITTED.

   A. EXISTING TOURIST ACCOMMODATION UNITS MAY BE TRANSFERRED TO DESIGNATED AREAS, IN CONJUNCTION WITH TRPA APPROVAL OF A PROJECT. THE BUILDINGS SHALL BE REMOVED AND THE SITE RESTORED, EXCEPT IN SPECIAL CIRCUMSTANCES OF PUBLIC BENEFIT AS SET FORTH BY ORDINANCE.

   B. AS PROVIDED IN GOAL #2 OF THIS SUBELEMENT AND GOAL #2 OF THE LAND USE SUBELEMENT, UP TO 200 ADDITIONAL UNITS NAY BE GRANTED AS BONUS UNITS IN TEE FIRST TEN YEARS OF THE PLAN IN CONJUNCTION WITH TRANSFER OF DEVELOPMENT RIGHTS. ORDINANCES SHALL ESTABLISH DETAILED PROVISI0NS WHICH SHALL ALLOW BONUSES OF VARYING AMOUNTS IN RELATION TO A UNIT TRANSFERRED, DEPENDING ON THE PUBLIC BENEFITS BEING PROVIDED BY THE PROJECT. NO BONUSES SHALL BE ALLOWED FOR PROJECTS OUTSIDE APPROVED CPs. BENEFITS TO CONSIDER SHALL INCLUDE EXTENT OF COVERAGE PLANNED, TRANSPORTATION IMPROVEMENTS, WATER QUALITY

IMPROVEMENTS, SCENIC IMPROVEMENTS, AND ACCESSORY SERVICES PROVIDED.

3. LAND COVERAGE MAY BE TRANSFERRED AS SET FORTH IN GOAL #3, POLICY 2, OF THE LAND USE SUBELEMENT, WITHIN THE RELATED HYDROLOGIC AREA, PROVIDED THE COVERAGE LIMITS SET FORTH IN THE LAND USE SUBELEMENT ARE NOT EXCEEDED.

   The transfer of land coverage may be implemented by parcel consolidation, parcel retirement, land coverage banking systems or other mechanisms approved by the TRPA.

   A. COVERAGE UTILIZED AS MITIGATION FOR EXCESS COVERAGE ON COMMERCIAL AND TOURIST ACCOMMODATION PROJECTS SHALL BE EXISTING HARD COVERAGE AS DEFINED BY ORDINANCE, EXCEPT WHERE THE GOVERNING BOARD FINDS THAT THERE IS AN INADEQUATE SUPPLY OF HARD COVERAGE AT A REASONABLE COST IN THE RELATED HYDROLOGIC AREA. IN THAT EVENT, THE BOARD MAY AUTHORIZE AN INCREASE IN THE SUPPLY OF COVERAGE FOR TRANSFER IN THE FOLLOWING ORDER OF PRIORITY: (1) INCLUDING EXISTING SOFT COVERAGE OR DISTURBED AREAS WITHIN THE DEFINITION OF COVERAGE, (2) INCLUDING POTENTIAL COVERAGE; AND (3) REDEFINING THE HYDROLOGIC BOUNDARIES IN THAT ARE&. POTENTIAL COVERAGE SHALL BE DEFINED AS BASE COVERAGE.

   B. COVERAGE TRANSFERRED OR USED AS MITIGATION TO ACCOMMODATE RESIDENTIAL PROJECTS, OUTDOOR RECREATION PROJECTS, PUBLIC SERVICE PROJECTS, REGIONAL PUBLIC FACILITIES, AND PUBLIC HEALTH AND SAFETY FACILITIES MAY BE EITHER EXISTING OR POTENTIAL COVERAGE. POTENTIAL COVERAGE SHALL BE DEFINED AS BASE COVERAGE.

   C. LINEAR PUBLIC FACILITIES PROJECTS, WHEN

TRANSFERRING OR MITIGATING COVERAGE OVER BASE COVERAGE, SHALL HAVE THE OPTION OF TRANSFERRING HARD OR SOFT COVERAGE IN ACCORDANCE WITH THESE PROVISIONS.

   D. TRPA, IN COOPERATION WITH OTHER AGENCIES, SHALL ESTABLISH A LAND COVERAGE BANKING SYSTEM.

      TRPA, to the extent possible, shall utilize a land coverage banking system to facilitate the elimination of excess land coverage and to provide transfer mechanisms. TRPA shall certify appropriate entities to acquire land coverage and implement restoration programs pursuant to this policy.

   E. COVERAGE TRANSFERS SHALL BE AT A RATIO OF 1:1 OR GREATER. EACH SQUARE FOOT OF COVERAGE ADDED BY TRANSFER SHALL REQUIRE REMOVAL OF ONE SQUARE FOOT OF COVERAGE, EXCEPT FOR THE SPECIAL PROVISION FOR ADDITIONAL COMMERCIAL COVERAGE OVER 50 PERCENT, AS SET FORTH IN THE LAND USE SUBELEMENT GOAL #3, POLICY 2.B AND OTHER RATIOS AS SET BY THIS PLAN.

   F. COVERAGE TRANSFERRED FOR A SINGLE-FAMILY HOUSE SHALL BE FROM A PARCEL EQUAL TO, OR MORE ENVIRONMENTALLY SENSITIVE THAN, THE RECEIVING PARCEL.

   G. IN THE CASE OF INDIVIDUAL PARCELS CONTAINING A STREAM ENVIRONMENT ZONE (SEZ), THE AMOUNT OF COVERAGE ATTRIBUTABLE TO THE SEE PORTION OF THE PARCEL MAY BE TRANSFERRED TO THE NON-SEZ PORTION OF THE PARCEL OR MAY BE UTILIZED IN THE SEZ PURSUANT TO THE ACCESS PROVISION SET FORTH IN GOAL #1, POLICY 5, OF THE STREAM ENVIRONMENT ZONE SUBELEMENT.

4. THE RESIDENTIAL PERMIT ALLOCATION SYSTEM SHALL PERMIT THE TRANSFER OF BUILDING

ALLOCATIONS FROM PARCELS LOCATED ON SENSITIVE LANDS TO MORE SUITABLE PARCELS.

As part of the permit allocation system, TRPA shall permit the transfer of building allocations from parcels in stream environment zones, Land Capability Districts 1-3, lands determined to be sensitive under IPES, or Class 1-4 shorezones, to parcels outside of these areas. However, no allocations shall be transferred to any parcel that is below the level defining the IPES top rank on January 1, 1989 unless the number of vacant parcels in the top rank is less than one-half the total inventory in that jurisdiction. Recipients of allocations may transfer across jurisdictional boundaries so long as the jurisdiction to which allocations are transferred has capacity to serve the additional development, both jurisdictions approve the transfer, and the receiving parcel is in land capability districts 4 - 7 or has an IPES rating above the January, 1989 level. Such interjurisdictional transfers shall be counted against the number of permits allocated to the jurisdiction from which the allocations are transferred.

5. BEFORE TRANSFER OF ANY DEVELOPMENT RIGHT OR LAND COVERAGE UNDER THIS GOAL IS EFFECTIVE, THE TRANSFERROR LOT SHALL BE APPROPRIATELY RESTRICTED OR RETIRED. IN THE CASE WHERE AN ALLOCATION HAS BEEN TRANSFERRED, OR ALL THE DEVELOPMENT RIGHTS OR COVERAGE HAS BEEN TRANSFERRED OFF A PARCEL DEEMED INAPPROPRIATE FOR FUTURE DEVELOPMENT, THE ENTIRE PARCEL SHALL BE RETIRED.

   In restricting or retiring a parcel, the implementing ordinances shall consider the retirement of all bonded indebtedness, site restoration, removal of future development potential, disclosure statements, public notice or recordation, and other requirements TRPA deems necessary. All transfers shall be approved by the affected jurisdictions.

6. TRANSFERS OF DEVELOPMENT RIGHTS, OTHER THAN LAND COVERAGE, SHALL BE LIMITED TO EQUIVALENT USES WITH NO INCREASE IN THE PARAMETERS BY WHICH THE USES ARE MEASURED

   BY THIS PLAN (E.G., FLOOR AREA, UNITS, PAOT). EQUIVALENT USES SHALL BE DEFINED BY ORDINANCE. DEVELOPMENT IMPACTS DUE TO THE RESULTING PROJECTS SHALL BE ADDRESSED AS PART OF THE PROJECT REVIEW PROCESS.

GOAL #4 CONDITION APPROVALS FOR NEW DEVELOPMENT IN THE TAHOE REGION ON POSITIVE IMPROVEMENTS IN OFF- SITE EROSION AND RUNOFF CONTROL AND AIR QUALITY.

To generate offsetting mitigation measures, which in turn will accelerate progress toward meeting the environmental thresholds, the Agency will implement the following policies:

POLICIES

1. NEW RESIDENTIAL, COMMERCIAL, AND PUBLIC PROJECTS SHALL COMPLETELY OFFSET THEIR WATER QUALITY IMPACTS THROUGH ONE OF THE FOLLOWING METHODS:

   A. IMPLEMENTING OFF-SITE EROSION AND RUNOFF CONTROL PROJECTS AS A CONDITION OF PROJECT APPROVAL AND SUBJECT TO AGENCY CONCURRENCE AS TO EFFECTIVENESS, OR

   B. CONTRIBUTING TO A FUND ESTABLISHED BY THE AGENCY FOR IMPLEMENTING OFF- SITE EROSION AND RUNOFF CONTROL PROJECTS. THE AMOUNT OF SUCH CONTRIBUTIONS IS ESTABLISHED BY AGENCY ORDINANCE.

      This policy continues the water quality mitigation funds established as part of TRPA's Lake Tahoe Basin Water Quality Management Plan. The fee schedules and distribution formula shall be reviewed and revised as part of the Agency's implementing ordinances and programs.

2. ALL PROJECTS SHALL OFFSET THE TRANSPORTATION AND AIR QUALITY IMPACTS OF THEIR DEVELOPMENT.

   The implementing ordinances for the Regional Plan will define stationary sources of air pollution which may locate in the Region, and define what constitutes a significant

environmental impact on air quality from stationary sources. Commercial and residential development contribute indirect impacts to air quality by increasing the number of vehicle trips in the Region. The cumulative impact of such trips is significant.

EXHIBIT C TO SCHOLLEY AFFIDAVIT

20.3 Land Coverage Limitations: No person shall create land coverage in excess of the limitations set forth in this chapter. This means to determine base land coverage, the manner to transfer land coverage and prohibitions of certain land coverage are set forth in this Section.

20.3.A Base Land Coverage Requirements: The allowable base land coverage ("base coverage") shall be determined by using the coefficients set forth in the report entitled, Land Capability Classifications of the Lake Tahoe Basin, Bailey, R.G. 1974. These coefficients are:

Lands Located In Land Capability District*	Base Coverage
1a, 1b, 1c	1%
2	1%
3	5%
4	20%
5	25%
6, 7	30%

*Lands located in Geomorphic Group I are classified land capability district 1 and are permitted one percent coverage.

20.3.A (1) General Rule: Except as provided in Subparagraphs 20.3.A(2), (3) and (4), the coefficients shall be applied to the project area in accordance with Subsection 20.3.D.

(2) Parcels In TRPA-Approved Subdivisions In Conformance With The Bailey Coefficients: In TRPA approved subdivisions where TRPA applied the coefficients on a subdivision-wide basis, and allowable coverages then were assigned to individual parcels, the assigned coverages shall be the base coverages for those parcels. The list of TRPA-approved subdivision in conformance with Bailey coefficients is Attachment D to the Goals and Policies.

(3) Parcels In Existing Planned Unit Developments (PUDs) Not In Conformance With The Bailey Coefficients: To determine the allowable base

coverage for parcels with; n an existing PUD, the coefficients shall be applied to the entire PUD. This total allowable coverage, minus existing the common area facilities coverage, shall be divided among the individual parcels in proportion to their respective sizes whether developed or not. Public rights-of-way shall not be included in the calculation. Accordingly, the method of calculation is as follows: first, the area of public rights-of-way is not to be counted second, allowable base coverage for the remaining area in the PUD is calculated; third, the amount of existing coverage of common areas is subtracted fourth, the remaining coverage is divided among the individual parcels, in proportion to size. In no case shall parcels of individual ownership be assigned an allowable base coverage of less than zero.

Example of calculation:

PUD Example: Five acre PUD (not including public rights-of-way) with 10 individual 50 x 50 parcels located in Land Capability District 4. Existing common area improvements such as parking, tennis court, and recreation center = 30,000 square feet of land coverage

- PUD size (217,800) x Coverage Coefficient (20%) Allowable Base Coverage (43,560)

Allowable Base Coverage (43,560) - Existing Improvements (30,000) = Remaining Allowable Base Coverage (13,560)

(20.3.A) Remaining Allowable Base Coverage (13,560) ÷ Number of Parcels (10) = Allowable Base Coverage Per Parcel (1,350)

(4) Relationship To IPES: Except as set forth in (2) and (3) above, the Individual Parcel Evaluation System ("IPES") ratings shall be used to determine allowable coverage for single family houses subject to IPES pursuant to Chapter 37.

20.3.B Transferred Land Coverage Requirements: In addition to the base coverage prescribed by Subsection 20.3.A,

land coverage may be transferred to a parcel pursuant to Subsection 20.3.C. Parcels and uses eligible for transfer of land coverage are set forth in this Subsection. The aggregate of base coverage and coverage transferred shall not exceed the limitations set forth below:

(1) Residential Facilities (1 to 4 Units): The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for residential facilities of four units or less is the coverage allowed pursuant to the coefficients in Subsection 20.3.A, or as follows, whichever is greater:

(a) Maximum Parcel Coverages:

Project Area (Sq. Ft.)	Maximum Land Coverage
0 - 4,000	Base Land Coverage Only
4,001 - 9,000	1,800 sq. Ft.
9,001 - 14,000	20% of Project Area
14,001 - 16,000	2,900 sq. ft.
16,001 - 20,000	3,000 sq. ft.
20,001 - 25,000	3,100 sq. ft.
25,001 - 30,000	3,200 sq. ft.
30,001 - 40,000	3,300 sq. ft.
40,001 - 50,000	3,400 sq. ft.
50,001 - 70,000	3,500 sq. ft.
70,001 - 90,000	3,600 sq. Ft.
90,001 - 120,000	3,700 sq. Ft.
120,001 - 150,000	3,800 sq. Ft.
150,001 - 200,000	3,900 sq. Ft.
200,001 - 400,000	4,000 sq ft.

(b) Planned Unit Developments: For parcels in planned unit developments, the maximum coverage allowed shall be 100 percent of the square feet, whichever is less. Parcels in PUDs with five or more units per parcel are considered

multi-residential and regulated pursuant to Subparagraph 20.3.B(3).

(c) Special Transfer Programs: Parcels in subdivisions with TRPA-approved transfer programs may be permitted the coverage specified by that approval. The only subdivision with such a program, as of the effective date of the Regional Plan, is Cave Rock Estates, Unit No. 3. The Cave Rock Estates, Unit No. 3 transfer program is set forth in the TRPA March 23, 1978 approval of that subdivision.

(d) Driveways: The maximum limits in Subparagraph 20.3.B(l)(a) may be increased by a transfer of land coverage for a driveway built in accordance with the standards in Chapter 24, which is to be created in connection with the construction of a single family house on an existing parcel, provided TRPA finds that:

(i) The construction will not result in a residential structure with land coverage greater than that permitted in Subparagraph 20.3.B(1) minus 400 square feet; and

(ii) The single family house, as a direct result of the increased land coverage, will be located on the parcel at the site found by TRPA to cause the least harm to the natural environment through minimization of land alterations, grading, removal of vegetation and preservation of tree. and other flora.

(2) Commercial Facilities: The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for commercial facilities located within community plans approved pursuant to Chapter 14 is as follows:

(a) For parcels upon which there is no development legally existing as of the effective date of the Regional Plan, maximum land coverage is 70 percent of the project area, which area is located within land capability districts 4 through 7, inclusive; and

(b) For parcels upon which there legally exists development as of the effective date of the Regional Plan, maximum land coverage is 50 percent of the project area, which area is located within land capability districts 4 through 7, inclusive.

(3) Tourist Accommodation Facilities, Multi-Residential Facilities (Five Or More Units), Public Service Facilities, And Recreation Facilities: The maximum land coverage (base coverage plus transferred coverage) allowed on a parcel for tourist accommodation facilities, multi-residential facilities of five units or more, public service facilities and recreation facilities is limited to 50 percent of the project area, provided the parcel is located within a community plan approved pursuant to Chapter 14. Such land coverage may be used only on the project area located within land capability districts 4 through 7, inclusive, referred to in Subsection 20.3.A. The provisions of this Subsection apply to parcels legally

existing on the effective date of the Regional Plan, upon which there exists no development, or, upon which there lawfully exists tourist accommodation, multi-residential (five or more units), public service, or recreation facilities.

(4) Linear Public Facilities And Public Health And Safety Facilities: The maximum land coverage (base coverage plus transferred coverage) for linear public facilities and public health and safety facilities is limited to the minimum amount needed to achieve their public purpose. Such transfer may be permitted, provided TRPA makes the following findings:

(a) The project is on the list of additional public service facilities if required pursuant to Section 33.5;

(b) There is no feasible alternative that would reduce land coverage,

(c) The project, because of its unusual configuration or service requirement, requires special consideration; and

(d) The facility primarily serves the needs of persons other than those who are, or will be, residents of the lands in question, or the owners of the land in question.

(5) Highways, Streets and Roads: Transfer of land coverage for highways, streets and roads may be permitted, provided TRPA, in addition to the findings in paragraph (4) above, makes the following findings:

(a) The highway, street, or road is required to provide access to

property other than that owned by the applicant; and

(b) The highway, street, or road will be constructed or maintained by a public agency, or is required to be so constructed or maintained by the terms and in accordance with the boundaries of a lawfully created easement recorded prior to February 10, 1972, or is required or approved by TRPA for a project approved after the effective date of the Regional Plan.

(6) Other Public Service Facilities Outside Community Plans: The maximum land coverage (base coverage plus transferred coverage) for other public service facilities located outside of an approved community plan is 50 percent of the project area. Transfer of land coverage for public service facilities located outside a community plan is limited to projects for which TRPA has made the following findings:

(a) The project is on the list of additional public service facilities if required pursuant to Section 33.5;

(b) There is no feasible alternative that would reduce land coverage; and

(c) There is a demonstrated need and requirement to locate the facility outside a community plan.

(7) Facilities For Public Safety And Access Of The Handicapped: Transfer of land coverage may be permitted for the addition of facilities for access of handicapped persons and for compliance with public safety laws, to facilities legally existing on the effective date of the

Regional Plan. The maximum land coverage (base coverage plus transferred coverage) shall be the minimum amount required to provide access to handicapped persons occupying a residence or as required by local, state or federal law.

(8) Water quality Control Facilities: Transfer of land coverage for water quality control facilities, such as erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar projects, programs and facilities, may be permitted the minimum amount of land coverage needed to achieve their purpose provided there is not reasonable alternative, including relocation, which avoids or reduces the land coverage.

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project: a community plan; redevelopment plant a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land

coverage to accommodate individuals needing coverage for transfer purposes.

(1) Land Coverage Transfer Ratios: Land coverage transferred from one parcel ("sending parcel.) to another parcel ("receiving parcel") shall be in accordance with the following ratios:

(a) General: Except for transfers relating to commercial uses within approved community plans, the transfer of one square foot of land coverage to a receiving parcel requires the retirement of one square foot of land coverage on the sending parcel (1:1 transfer ratio).

(b) Commercial Uses Within Approved Community Plans: Receiving parcels within approved community plans, upon which there exist commercial facilities, shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), up to the maximum 50 percent land coverage prescribed by Subparagraph 20.3.B(2)(b). Undeveloped receiving parcels within approved community plans, eligible for the maximum 70 percent land coverage prescribed by Subparagraph 20.3.B.2(a), shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), until the total land coverage reaches 50 percent of the project area. Undeveloped parcels shall be eligible to receive additional transferred land coverage in excess of the 50 percent limit, until the total land coverage reaches the maximum 70 percent, provided the additional coverage over 50 percent shall be transferred at the ratio set forth in the following chart:

Percent of Final Coverage	Transfer Ratio
51	1.05:1
52	1.1:1
53	1.15:1

54	1.2:1
55	1.25:1
56	1.3:1
57	1.35:1
58	1.4:1
59	1.45:1
60	1.5:1
61	1.55:1
62	1.6:1
63	1.65:1
64	1.7:1
65	1.75:1
66	1.8:1
67	1.9:1
68	1.95:1
70	2:1

Transfer Example:

Five Acre Parcel = 217,800 so. ft.
Allowable Base Coverage = 30% = 65,340 so. ft.
Proposed Project Coverage - 60% = 130,680 so. ft.

Transfer Requirement

0 to 30% - None	=	0
30 to 50% - 1:1	=	43,560 so. ft.
50 to 60% - 1.5:1	=	32,670 so. ft.
Total Coverage to be Transfered		76,230 so. ft.

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

(a) Hard Coverage: Hard land coverage may be transferred in all cases.

(b) Soft Coverage: Soft land coverage may be transferred in all cases, except for transfers relating to commercial or tourist accommodation uses or facilities.

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may

be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6)

(d) Coverage For Single Family House: Coverage transferred for a single family house, including, but not limited to, a house to be constructed pursuant to IPES, shall be from a sending parcel as environmentally sensitive as, or more environmentally sensitive than, the receiving parcel. If both sending and receiving parcels have not received IPES rating scores, relative environmental sensitivity shall be determined by comparing the land capability classification of each parcel. If both parcels have IPES rating scores, sensitivity shall be determined by comparing the scores of each. If one parcel has an IPES rating score and the other does not, TRPA shall determine sensitivity.

(e) Coverage for Water Quality Control Facilities: control facilities pursuant to Subsection 20.3.B(8l shall be in accordance with (a) through (c) above, or shall be mitigated through restoration in accordance with Subsection 20.4.C, in the amount of 1.5 times the area of land covered or disturbed for the project beyond that permitted by the co-efficients in Subsection 20.3.A.

(3) Sending Parcels Classified As Sensitive Lands (Land Capability Districts 1-3): If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

(4) Sending Parcels Classified As High Capability Lands (Land Capability Districts 4-7): If land coverage is transferred from a sending parcel that is located entirely within Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B.

(5) Hydrologically Related Area *Transfer* Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

(6) Inadequate Supply Of Land Coverage: If TRPA, after conducting a mandatory annual review of the cost of land coverage available at the land bank, finds there is an inadequate supply of hard land coverage for commercial or tourist accommodation uses at a reasonable cost within a given hydrologically related area, TRPA may authorize an increase in the supply of land coverage for transfer in the order of priority set forth below. In determining "reasonable cost," TRPA shall consider: whether there is no market for the coverage due to its cost, limited supply or simple absence of transactions; and other pertinent factors. Prior to authorizing an increase in supply of land coverage, TRPA also shall consider the effect of the increase on the inventory in the land bank and the value of investments made by the bank in hard or soft land coverage. If TRPA authorizes an increase in the supply of land coverage, it shall do so in the following order of priority:

(a) Existing soft coverage as described in the definition of "land coverage."

(b) Unused base coverage, referred to in the Goals and Policies as "potential coverage."

(c) Through redefinition of the boundaries of the hydrologically related area to increase the supply of coverage.

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provision for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

(b) Retirement Of Land Coverage For Credit: In the event land coverage is retired on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraph 20.3.C(7)(a)(i) and (ii), to assure credit for the retired coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land coverage retirement programs may use a land bank pursuant to Chapter 38

20.3.D Method Of Calculation Of Land Coverage: Land coverage requirements shall be implemented by application of the percentage coverage figures set forth in Subsections 20.3.A and 20.3.B to the area of the project. Determination of the project area and the method of applying the percentage coverage figures to the project area are set forth in this Subsection.

(1) Determination Of The Project Area: The project area shall be calculated as follows:

(a) Boundaries Or Area Of Land Involved:

(i) For a project on a single parcel, the area of the project is the area of the parcel.

(ii) For a project on or comprising two or more contiguous parcels, the project area is the total combined square footage of the parcels, provided the parcels are merged pursuant to Chapter 45. If the parcels are not merged, the owner shall record against the parcels a deed restriction, or other covenant running with the land, permanently assuring that the land coverage calculations for the parcels shall always be made as if the parcels had been legally merged.

(iii) Where the proposed activity or project, for which land coverage is to be calculated, is a use accessory to an existing primary use located on or comprising one or more adjacent parcels, the project area for the accessory use is the total combined square footage of all of said parcels, owned or controlled by the same person, provided the parcels are merged pursuant to Chapter 45. If the parcels are not merged the owner shall record

against the parcels a deed restriction, or other covenant running with the land, permanently assuring that the coverage calculations for the parcels shall always be made as if the parcels had been legally merged.

(iv) For a project on a single parcel in excess of 20 acres, or on an area of land not consisting of a parcel, TRPA shall determine the project area based upon the following factors, among others, appropriate for this purpose: the area impacted by or the sphere of influence of the project; the area to be actually used for the project: whether the project is located in one or more hydrologically related areas; and the extent of land coverage and land disturbance for the project.

(b) Land Not Included In The Project Area: The project area shall not include lands lakeward of the high-water lines of bodies of water, such as lakes and ponds, lands underlying covered surfaces associated with existing linear public facilities, highway, streets, and roads, referred to in Subsection 20.3.S, and easements or rights-of-way allowing potential land coverage for linear public facilities, highways, streets, and roads. Land coverage associated with existing linear public facilities, highway, street. and roads shall not be considered in the calculation of land coverage, except as pertinent to the review by TRPA of the facilities, highway, streets or roads, or as required pursuant to Subsection 20.3.D(2)(c).

(c) Separate Calculation For The Area Within Each Land Capability District: With the exception of land coverage for IPES pursuant to Chapter 37, land coverage shall be

calculated by reference to the square footage area of each, separate land capability district located within the project area, applying the applicable percentage coverage figures set forth in Subsections 20.3.A and 20.3.B to the square footage within each respective land capability district.

(2) Application Of Percentage Coverage Figures To The Project Area: The percentage coverage figures shall be applied to the project area as follows:

(a) Base Coverage: The amount of base land coverage shall be calculated by applying the percentage coverage figures set forth in Subsection 20.3.A to the project area determined pursuant to Subsection 20.3.D(1). Base land coverage placed upon the portions of the project area within Land Capability Districts 1 through 3, inclusive, shall not exceed, as to each such portion, the maximum amount of land coverage determined by applying the corresponding percentage coverage figure to the area of each such portion. With respect to an area of the project containing land within Land Capability Districts 4 through 7, inclusive, the following rules apply:

(i) For a parcel or other project area up to and including one-third (1/3) of an acre, base coverage attributable to all land capability districts on the parcel may be aggregated and the resulting total coverage placed at any location on the parcel lying within Land Capability Districts 4 through 7, inclusive, but not within Land Capability Districts 1 through 3, inclusive.

(ii) For a parcel or other area of the project over one-third (1/3) of an acre, base coverages attributable to land within Land Capability District 4 through 7,

inclusive, may be placed upon the pertinent land, up to the maximum amount of land coverage determined by applying the corresponding percentage coverage figure. Aggregate base coverages attributable to portions of the parcel or other project area within Land Capability Districts 1 through 3, inclusive, also may be placed at any location on the parcel or such other area lying within Land Capability Districts 4 through 7, inclusive. No coverage shall be placed on any land within Land Capability Districts 1 through 3, inclusive, except as provided in Subsection 20.3.A.

(iii) As an alternative to Subparagraph 20.3.D(2)(a)(ii), the percentage coverage figure corresponding to the lowest land capability district number of Land Capability Districts 4 through 7, inclusive, that exists on the parcel or other project area, may be applied to the total area encompassed by Land Capability Districts 4 through 7, inclusive, to determine the amount of coverage, to which amount may be added the aggregate of base coverages attributable to portions of the parcel or other project area within Land Capability Districts 1 through 3, inclusive. No coverage shall be placed on any land within Land Capability Districts 1 through 3, inclusive, except as provided in Subsection 20.3.A.

(b) Transferred Coverage: In the event additional coverage is permitted by transfer of land coverage pursuant to Subsection 20.3.B, the amount of total coverage shall be calculated by applying the percentage coverage figures set

forth in Subsection 20.3.B to the project area determined pursuant to Subparagraph 20.3.D(1).

(c) Land Coverage In Right-Of-Way: Existing or proposed land coverage in a public street or highway right-of-way shall be attributable to the owner of the right-of-way. Proposed coverage in such right-of-way shall be pursuant to a transfer of land coverage based upon a ratio of one square foot of land coverage retired for each square foot of new coverage proposed. Transfer of such coverage shall be pursuant to the requirements of Subsection 20.3.C. The owner of the right-of-way may arrange the transfer of land coverage with the person, if any, benefiting from the proposed land coverage in the right-of-way.

(3) Calculation Of Permissible Land Coverage Under IPES: Calculation of permissible land coverage for parcels subject to IPES shall be in accordance with Chapter 37.

(4) Overhang Allowance: For every three feet off of the ground surface, one foot of the horizontal overhang dimension shall be excluded from land coverage calculations. The remainder of the overhang shall be counted.

20.4 Prohibition Of Additional Land Coverage In Land Capability Districts 1a, 1c, 2 And 3 And 1b (Stream Environment Zones): No additional land coverage or other permanent land disturbance shall be permitted in Land Capability Districts 1a, 1o, 2, and 3 and Land Capability District 1b (stream environment zones) except as follows:

20.4.A Exceptions For Land Capability Districts 1a, 1o, 2 And 3 Prohibition: The following exceptions apply to the prohibition of land coverage and disturbance in Land Capability Districts 1a, 1c, 2 and 3:

(1) IPES: Land coverage and disturbance for single family houses may be permitted in Land Capability Districts 1a, 1o, 2 and 3, when reviewed and approved pursuant to IPES in accordance with Chapter 37.

(2) Public Outdoor Recreation Facilities: Land coverage and disturbance for public outdoor recreation facilities, which includes public; recreation projects on public lands, private recreation projects through use of public lands, and private recreational projects on private lands that are depicted or provided for on a public agency's recreational plan, may be permitted in Land Capability Districts 1a, 1c, 2 and 3 if TRPA finds that:

(a) The project is a necessary part of a public agency's long-range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature, must be sited in Land Capability Districts 1a, 1c, 2 or 3, such as a ski run or hiking trail; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3, or SEZs), Water Quality Management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which avoids or reduces the extent of encroachment in Land Capability Districts 1a, 1o, 2 and 3; and

(e) The impacts of the coverage and disturbance are fully mitigated through means including, but not limited to, the following:

(i) Application of best management practices; and

(ii) Restoration, in accordance with Section 20.4.C, of land in Land Capability Districts la, lc, 2 and 3 in the amount of 1.5 times the area of land in such districts covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.

(3) Public Service Facilities: Land coverage and disturbance .for public service facilities may be permitted in Land Capability Districts la, lc, 2 and 3 if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts la, lc, 2 and 3; and .

(c) The impacts of the coverage and disturbance are fully mitigated in the manner prescribed by Subparagraph 20.4.A(2)(e).

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability Districts la, lc, 2 and 3 for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects, and similar projects, programs and facilities if TRPA finds that:

(a) The project, program or facility is necessary for environmental protection; and

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in Land Capability Districts la, lc, 2 and 3.

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

(5) Tyrolian Village: Land coverage and disturbance for single family houses may be permitted in Land

Capability Districts la, lc, 2 and 3, when reviewed and approved in accordance with Chapter 36, on parcels in Tyrolian Village, Units #l through 5, inclusive, for which complete applications were filed and accepted by TRPA pursuant to the "Agreement Between The Tyrolian Village, Inc. And The Tahoe Regional Planning Agency Regarding Erosion Control Improvements And Reclassification Of Upper Tyrolian Village" dated May 26, 1983."

20.4.B Exceptions For Land Capability District 1b (Stream Environment Zone): The following exceptions apply to the prohibition of land coverage and disturbance in land capability district 1b (stream environment zone):

(1) Stream Crossings: Land coverage and disturbance for projects to effect access across steam environment zones to otherwise buildable sites, if such projects otherwise comply with applicable development standards in Chapter 27, may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone, or that encroachment is necessary to reach the building site recommended by IPES; and

(b) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(2) Public Outdoor Recreation: Land coverage and disturbance for public outdoor recreation facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is a necessary part of a public agency's long range plans for public outdoor recreation;

(b) The project is consistent with the Recreation Element of the Regional Plan;

(c) The project, by its very nature must be sited in a stream environment zone, such as bridges, stream crossings, ski run crossings, fishing trails, and boat launching facilities; in accordance with the Guidelines Regarding Public Outdoor Recreation Facilities and Activities Which Create Additional Land Coverage or Permanent Disturbance and Which By Their Very Nature Need Not Be Sited in Sensitive Lands (1a, 1b, 1c, 2, 3 or SEZs), Water Quality management Plan for the Lake Tahoe Region, Volume I, Table 16, dated November, 1988.

(d) There is no feasible alternative which would avoid or reduce the extent of encroachment in the stream environment zone; and

(e) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and

shall include coverage and disturbance within the permitted Bailey coefficients.

(3) Public Service: Land coverage and disturbance for public service facilities may be permitted in Land Capability District 1b (stream environment zones) if TRPA finds that:

(a) The project is necessary for public health, safety or environmental protection;

(b) There is no reasonable alternative, including a bridge span or relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) The impacts of the land coverage and disturbance are fully mitigated in the manner set forth in Subparagraph 20.4.A(2)(e), with the exception that the restoration requirement in such Subsection shall apply exclusively to stream environment zone lands and shall include coverage and disturbance within the permitted Bailey coefficients.

(4) Water Quality Control Facilities: Land coverage and disturbance may be permitted in Land Capability District 1b (stream environment zones) for erosion control projects, habitat restoration projects, wetland rehabilitation projects, stream environment zone restoration projects and similar programs and facilities if TRPA finds that:

(a) The project, program, or facility is necessary for environmental protection;

(b) There is no reasonable alternative, including relocation, which avoids or reduces the extent of encroachment in the stream environment zone; and

(c) Impacts are fully mitigated and, if applicable, transferred land coverage requirements pursuant to 20.3.C(2)(e) are met.

20.4.C Restoration Requirements: The following requirements apply to restoration:

(1) The restoration requirements of Subparagraphs 20.3.C(2)(e) and 20.4.A(2)(e), may be accomplished onsite or offsite by the applicant or another agency approved by TRPA. Such restoration requirements shall be in lieu of any land coverage transfer requirement or water quality mitigation fee pursuant to Chapter 82.

(2) Only land which has been disturbed or consists of hard coverage or soft coverage shall be eligible for credit for restoration. Restoration plans shall require restoration to cause the area to function in a natural state with provisions for permanent protection from further disturbance. Lands disturbed by the project and then restored are not eligible for credit. Permanent protection from further disturbance shall include, but not be limited to, recordation by the owner of deed restrictions, or other covenants running with the land, on a form approved by TRPA, against parcels in private ownership, permanently assuring the restoration requirements of Subparagraphs 20.3.C(2)(e) or 20.4.A(2)(e), as applicable. TRPA shall obtain appropriate assurance from a public agency that the requirements of Subparagraph 20.3.C (2)(e) or 20.4.A(2)(e), as applicable are met.

20.5 Excess Land Coverage Mitigation Program: This Section applies to projects where the amount of land coverage existing prior to the project in the project area exceeds the base land coverage for the project area prescribed by Subsection 20.3.A. Land coverage in excess of the base land coverage shall be mitigated by the transfer of land coverage pursuant to Subsection 20.3.C or the land coverage mitigation program set forth in this Section.

CHAPTER 34
TRANSFER OF DEVELOPMENT

Chapter Contents

34.0 Purpose
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34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
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34.0 Purpose This chapter sets forth the provisions for the transfer of residential- development rights, residential allocations, and existing development, from one parcel to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or

community plan where residential uses are permissible and shall meat the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transfered.

34.4 Transfer Or Relocation Of Existing Development: Certain elements of existing development may be transferred or relocated from one parcel to another if the receiving parcel is in a plan area or community plan area designated as a receiving area for existing development. Existing residential development may be transferred to any plan area where residential use is a permissible use. The transfer of existing development shall not be considered additional development and is exempt from the applicable allocation system.

34.4.A Eligibility: The following elements of the existing development shall be eligible for transfer:

(1) Units Of Use: Units of use may be transferred within the same major use classifications e.g., residential, tourist accommodation,

commercial, public service and recreation. The amount of use transferred shall be measured in appropriate units of use, e.g. residential units, tourist accommodation units, commercial floor area, and PAOTs.

(2) Land Coverage: Land coverage may be transferred pursuant to Chapter 20.

34.4.B Requirements: Transfers of existing development may be permitted pursuant to the following requirements:

(1) The transfer is limited to the units of use, and land coverage existing on the parcel from which the development is to be removed;

(2) The use transferred is a permissible use on the receiving parcel as set forth in the plan area statement or community plan;

(3) The transfer complies with the site development provisions established by this Code and plan area statements for the receiving parcel;

(4) The findings required for a special use in Chapter 18 are made if the use transferred is a special use in the receiving area;

(5) The approval of affected local governments shall be obtained;

(6) The parcel, or the portion of the parcel, from which the existing development is transferred shall be restricted or retired pursuant to Section 34.5 at the time of commencement of construction of the related project;

(7) All facilities, including building and structures, are found to be appropriate for removal considering conformance with TRPA plans and the Code, such as the provisions for historical structures.

(8) The receiving parcel has a building site that is determined to be in Land Capability Districts

4, 5, 6, or 7; or, if applicable, in the top rank under IPES; and

(9) No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction.

(10) Transfers in accordance with Section 36.4 shall not be subject to the limitation of IPES set forth in subparagraphs (8) and (9) above.

34.4.C Limitations: The following limitations apply to transfer of existing development:

(1) Units of use transferred shall have been legally established.

(2) Transfers of use shall not be permitted for development that has become derelict.

34.5 Restriction Or Retirement Of Parcels: Restriction or retirement of parcels, or portions of parcels, for the purposes set forth in this Code, shall comply with the following requirements:

34.5.A Land Coverage: Parcels from which land coverage has been transferred are subject to provisions of Chapter 20.

34.5.B Allocation Transfer: Parcels from which allocations have been transferred shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.C Existing Development Transfer: For parcels from which units of existing development have been transferred, the structures or facilities accounting for

that use shall be removed or modified and the land restored and maintained in as natural a state as is possible, so as to eliminate the units transferred.

34.5.D Payment Of Bonds: All bonds, assessments, back taxes, fees and liens affecting that portion of a parcel to be retired pursuant to a transfer under this chapter shall be paid in full.

34.5.E Transfer Of All Existing Development From Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEZ, from which all units of existing development have been transferred, shall be restored pursuant to Subsection 34.-5.C and shall be permanently restricted to open space by Indeed restriction, or other covenant running with land, recorded by the owner.

34.5.F Transfer Of Some Existing Development From Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEZs, from which less than all units of existing development have been transferred, shall be permanently restricted from transfering development back to the parcel by deed restriction, or other covenant running with the land, recorded by the owner.

34.5.G Transfer Of Existing Development From Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6, or 7, from which units of existing development have been transferred, shall be restricted by deed restriction, or other covenant running with the land, recorded by the owner. The restriction shall limit the units of use to any remaining, until or unless:

(1) A transfer back to the parcel, is approved by TRPA pursuant to this chapter;

(2) An allocation is obtained pursuant to an approved community plan; or

(3) Results in the elimination of nonconforming use.

34.5.H Development Rights Transfer On Sensitive Lands: Parcels in Land Capability Districts la, lb, lc, 2, or 3, or SEE, from which all residential development rights have been transferred, shall be permanently retired.

(1) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently removing the development rights from the parcel shall be recorded by the owner.

(2) For parcels in public ownership, the public agency shall provide TRPA with binding assurance that the development rights have been permanently retired.

34.5.I Development Right Transfer On Non-Sensitive Lands: Parcels located in Land Capability Districts 4, 5, 6 and 7, from which all residential development rights have been transferred, shall be restricted to open space by deed restriction, or other covenant running with the land, recorded by the owner, but shall be eligible to receive future transfers of coverage or units of use if otherwise permitted in (1), (2) and (3) of Subsection 34.5.G above.

34.5.J Free Of Nuisance: The sending parcel shall be free of nuisance and hazard.

34.5.K Relation To Chapter 38: TRPA shall record the appropriate changes created by transfers in its records pursuant to Chapter 38.

34.6 Basic Service Requirements: The basic service requirements of Chapter 27 are applicable to a receiving parcel. Approval of a transfer shall not be granted unless the receiving parcel meets those basic service requirements.

37.3 Procedure For Establishing SEZ Boundaries And Setbacks: The IPES field evaluation teams shall use the following procedures and definitions for purposes of determining the presence and boundaries of an SEZ and establishing SEZ setbacks.

37.3.A Definitions: The definitions are as follows:

(1) Alluvial Soils - All the following soil types owe their major characteristics to the presence of surface or subsurface water:

(a) Loamy alluvial land (Lo)
(b) Elmira loamy coarse sand, wet variant (Ev)
(c) Celia gravelly loamy coarse sand (Co)
(d) Marsh (Mh)
(e) Gravelly alluvial land (Gr)
(f) Fill land (Fd)

(2) Confined - Stream types classified under major categories A and B. and stream type C2, as defined in the report entitled "A Stream Classification System," David L. Rosgen, April, 1985.

(3) Designated Flood Plain - The limits of the Intermediate Regional Flood where established for creeks by the U.S. Army Corps of Engineers, or the limits of the 100-year flood where established for creeks by the U.S. Army Corps of Engineers.

(4) Ephemeral Stream - Flows sporadically only in response to precipitation, with flows lasting a short time.

(5) Groundwater Between 20-40 Inches - Evidence of ground water between 20 and 40 inches below the ground surface (somewhat poorly drained soil).

(6) Intermittent Stream - Flows in response to precipitation or snow melt.

(7) Lake - A water body greater than 20 acres in size, exceeding two meters deep at low water and lacking trees, shrubs, persistent emergents, emergent mosses or lichens with greater than 20 percent aerial coverage.

(8) Man-Made Channel - A channel constructed by man for the purpose of conveying water or a channel created by water being discharged from a man-made source, such as a culvert or pipe.

(9) Near Surface Groundwater - Evidence of ground water within 20 inches of the ground surface (poorly drained soil).

(10) Perennial Stream - Permanently inundated surface stream courses. Surface water flows throughout the year except in years of infrequent drought. Perennial streams shall be those shown as solid blue lines on USGS Quad Maps, or streams determined to be perennial by TRPA.

(11) Pond - A standing water body less than 20 acres in size and/or less than two meters deep at low water.

(12) Primary Riparian Vegetation - The following vegetative community types as identified in the 1971 report entitled Vegetation of the Lake Tahoe Region, A Guide for Planning:"

(a) Type 0: Open water - Open water, Swamps and pools and Vernal pools.
(b) Type 2: Herbaceous - Wet marsh or meadow and Sphagnum bog.
(c) Type 7: Riparian shrub - Willow thicket and Alder thicket.
(d) Type 9: Broadleaf - Low elevations.

(13) SEZ Setbacks - A strip of land adjacent to the edge of a SEZ, the designated width of which is considered the minimum width necessary to protect the integrity of the various characteristic of the SEZ. The width of the setback shall be established in accordance with the procedure set forth in Subsection 37.3.D.

(14) Secondary Riparian Vegetation - The following vegetative types as identified in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning:"

(a) Type 2: Herbaceous - Wet mesic meadow.
(b) Type 9: Broadleaf - High elevations.
(c) Type 19: Lodgepole - Wet type.

(15) Slope Condition - The condition of the slope located adjacent to the stream channel or edge of the SEZ shall be defined as follows. The extent of existing slope protection, which is defined as the percent cover of original duff layer, down logs, low growing vegetation or rock fragments greater than 1-2 inches in diameter, shall be given primary consideration when determining slope condition.

(a) Good - Slopes show little or no evidence of surface (sheet, rill, gully) erosion or mass wasting. Slopes are typically covered 90 percent or more with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly less than 30 percent. Soil horizons are usually cohesive and consolidated.

(b) Average - Slopes show evidence of surface (sheet, rill, gully) erosion or mass wasting over 5 to 25 percent of the slope surface. Slopes are typically covered between 50 to 90 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is commonly between 30 and 70 percent. Soil horizons are typically moderately cohesive and consolidated.

(c) Poor - Slopes show evidence of active and pronounced surface (sheet, rill, gully) erosion or mass wasting over more than 50 percent of the elope surface. Slopes are typically covered less than 50 percent with original duff layer, down logs, slash, low growing vegetation or rock fragments greater than 1-2 inches in diameter. Slope gradient is often greater than 70 percent. Soil horizons are typically non-cohesive and unconsolidated. Evidence of seeping is often present.

(16) Terrace - A moderately flat land area, above the flood plain, generally less than 20 percent slope.

(17) Unconfined - Stream types classified under major categories C (excluding stream type C2), D and E as defined in the report entitled "A Stream Classification System, n David L. Rosgen, April 1985.

37.3.B Identification: A stream environment zone (SEZ) shall be determined to be present if any one of the following key indicators is present or, in absence of a key indicator, if any three of the following secondary indicators are present. Plant communities shall be identified in accordance with the definitions and procedures contained in the 1971 report entitled "Vegetation of the Lake Tahoe Region, A Guide for Planning."

(1) Key Indicators: Key indicators are:

(a) Evidence of surface water flow, including perennial, ephemeral and intermittent streams, but not including rills or man-made channels;
(b) Primary riparian vegetation;
(c) Near surface groundwater;
(d) Lakes or ponds;
(e) Beach (Be) soil; or
(f) One of the following alluvial soils:

(i) Elmira loamy coarse sand, wet variant (Ev).
(ii) Marsh (Mh).

(2) Secondary Indicators: Secondary indicators are:

(a) Designated flood plain;
(b) Groundwater between 20 - 40 inches;
(c) Secondary riparian vegetation;
(d) One of the following alluvial soils:

(i) Loamy alluvial land (Lo);
(ii) Celia gravelly loamy coarse sand (Co); or
(iii) Gravelly alluvial land (Gr).

37.3.C Boundaries: The boundaries of an SEZ shall be the outermost limits of the key indicators; the outermost

limits where three secondary indicators coincide' or, if Lo, Co, or Gr soils are present, the outermost limits where two secondary indicators coincide, whichever limits establish the widest SEZ at any particular point. The outermost boundaries of a stream shall be the bank full width of such stream, which shall be defined as the level of frequent high flow, i.e., the level of flood with a recurrence interval of approximately 1.5 years.

37.3.D SEZ Setbacks: No buildings, other structures or land coverage shall be permitted in SEZ setbacks, except in accordance with Subsection 20.4.B and the exception for the backshore set forth in Subsection 55.4.D. The restoration requirements set forth in Subparagraph 20.4.A(2)(c) shall not apply within SEZ setbacks. The allowable base land coverage within SEZ setbacks shall be in accordance with Subsection 20.3.A, and may be combined with the allowable base land coverage for the remainder of the parcel to establish a total allowable base land coverage. A portion of the total allowable base land coverage for the parcel may be used to allow construction in the SEZ setback only in accordance with Subsection 20.4.B and the exception for the backshore set forth in Subsection 55.4.D. SEZ setbacks shall be established in accordance with the following criteria (see also Section I of the Technical Appendices).

(1) Confined Perennial Stream: When a confined perennial stream is present, the following setbacks shall be established based on the corresponding slope condition:

(a) Good Slope Condition: When the slope condition is identified as good, the setback shall be 25 feet from the edge of the SEZ or is feet from the edge of a terrace, i' present, whichever is less.

(b) Average Slope Condition: When the slope condition is identified as average, the setback shall be 3S feet from the edge of the SEZ or 20 feet from the edge of a terrace, if present, whichever is less.

(c) Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 60 feet from the edge of the SEZ or 35 feet from the edge of a terrace, if present, whichever is less.

(2) Unconfined Perennial Stream: When an unconfined perennial stream is present, the setback shall be 50 feet from the edge of the SEZ.

(3) Confined Ephemeral Or Intermittent Stream: When a confined ephemeral or intermittent stream is present the following setbacks shall be established based on the corresponding slope conditions:

(a) Good Slope Condition: When the slope condition is identified as good, the setback shall be 15 feet from the edge of the SEZ or ten feet from the edge of a terrace, if present, whichever is less.

(b) Average Slope Condition: When the slope condition is identified as average, the setback shall be 25 feet from the edge of the SEZ or 15 feet from the edge of a terrace, if present, whichever is less.

(c) Poor Slope Condition: When the slope condition is identified as poor, the setback shall be 40 feet from the edge of the SEZ or 25 feet from the edge of a terrace, if present, whichever is less.

(4) Unconfined Ephemeral Or Intermittent Stream: When an unconfined ephemeral or intermittent stream is present the setback shall be 2S feet from the edge of the SEZ.

(5) Channel Absent: When there is an SEZ present but there is no associated channel identified, the setback shall be ten feet from the edge of the SEZ.

(6) Lakes and Ponds: Where a lake or pond is present, the SEZ setback shall be 10 feet from the high water line or 10 feet from the edge of the SEZ, whichever

is greater, except where a backshore is established in accordance with Section SS.2 in which case there shall be no SEZ setback established.

37.3.E SEZ Documentation: Where the IPES field team identifies the existence of an SEZ on an individual parcel, it shall prepare a permanent written record or drawing applicable to that parcel showing the boundaries of the 'SEZ, the setback line from the SEZ and setting forth the reasons for its determination. At the time a project is reviewed applicable to a parcel evaluated under IPES as having an SEZ, the SEZ boundaries and setback shall be verified or adjusted based upon additional information then available.

37.4 Area To Be Evaluated: The score received by a parcel shall be based on evaluation of an area established in accordance with the following provisions.

37.4.A Parcels Of 1/3 Acre Or Less: Parcels of 173 acre or less in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate the entire parcel, except as provided for under Subparagraph (3), below.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with the following procedures:

(a) Segment readings shall be taken perpendicular to the natural contours and through the middle of the most likely building site as determined by the evaluation team in accordance with Section 37.7;

(b) Enough segments shall be recorded for each parcel so that the sum of all segment lengths is equal to approximately 120 feet. In cases where segment lengths totaling 120 feet can not be obtained within a parcel's boundaries,

segment readings shall be taken on adjacent parcels; and

(c) Segment readings shall begin 60 feet above the middle of the most likely building site or at the top of the cut slope or toe of the fill slope adjacent to the public right-of-way or other access road.

(3) Parcels Containing A SEZ: Where a parcel contains an SEZ, the evaluation team shall evaluate only that portion of the parcel located outside the SEZ. The score received by parcels containing less than 5,000 square feet outside an SEZ shall be multiplied by a factor equal to the area outside the SEZ divided by 5,000 square feet. Parcels containing no area outside an SEZ or SEZ setback shall receive a total score of zero.

(4) Parcels Less Than 10,000 Square Feet Or With Less Than 10,000 Square Feet Outside An SEZ: The score received by parcels that are less than 10,000 square feet in size or with less than 10,000 square feet outside an SEZ shall be multiplied by a factor derived from the equation set forth in Section H of the Technical Appendices.

(a) The score received by parcels that contain less than 5,000 square feet outside an SEZ shall be multiplied by the factors established in Subparagraphs (3) and (4), above.

(b) The procedure set forth in Section 37.3 shall be used by the field evaluation teams to establish the area of a parcel outside a SEZ.

37.4.B Parcels Greater Than 1/3 Acre But Less Than Five Acres: Parcels that are greater than 1/3 acre but less than five acres in size shall be evaluated in accordance with the following procedures:

(1) Area To Be Evaluated: The evaluation team shall evaluate an area of approximately 1/3 acre in size that includes the most likely building site as determined by the evaluation team in accordance

with Section 37.7. In determining the location of the area to be evaluated, the team shall select the 1/3 acre that results in the highest score.

(2) Slope Length And Gradient Readings: Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2).

(3) Parcels Containing A SEZ: In the case where the best 1/3 acre contains a SEZ the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.4.C Parcels That Are Five Acres Or Greater: Owners of parcels that are five acres or greater in size shall be contacted by T8PA and asked to identify the location of the 1/3 acre portion of the parcel which includes their desired building site. Once the 173 acre portion has been identified, the evaluation team shall evaluate this portion of the parcel to determine the parcel's score. Slope length and gradient readings shall be taken in accordance with Subparagraph 37.4.A(2) and, if the 1/3 acre contains an SEZ, the procedures set forth in Subparagraphs 37.4.A(3) and (4) shall be followed.

37.5 Evaluation Teams: The members of each evaluation team shall be selected by TRPA and shall consist of professionals in the fields of soil science, hydrology and engineering or planning.

37.6 Eligibility Criteria: Parcels shall be determined to be eligible for evaluation, scoring and ranking under IPES in accordance with the following provisions.

37.6.A Vacant Parcels: Vacant parcels that are permitted a single family dwelling as an allowed or special use in accordance with Chapter 18 shall be eligible, provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.B Parcels That Are Not Vacant: Parcels that are not vacant and do not contain a single family dwelling shall be eligible as though they are vacant upon receipt by TRPA of a written request by the parcel

owner that the parcel be evaluated and provided the parcel is otherwise eligible under Subsection 37.6.C.

37.6.C Special Situations: In the following special situations, parcels are ineligible, except as otherwise stated.

(1) Right Of Entry: Parcels for which the owner refuses to grant TRPA the right of entry pursuant to Subsection 37.9.A shall not be eligible, unless the owner subsequently grants TRPA the right of entry.

(Certificate of Service by Mail omitted in printing.)

11/23/93

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, CV-N-91-040-ECR
Plaintiff,
v.

TAHOE REGIONAL PLANNING AGENCY; and STATE of NEVADA,
Defendants.
/

ORDER

Plaintiff Bernadine Suitum alleges that the regulations adopted and implemented by the Tahoe Regional Planning Agency (TRPA) have resulted in a taking of her single-family residential lot in Incline Village without just compensation and due process of the law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. In addition, plaintiff alleges that TRPA's action in this matter constitutes a violation of substantive due process and a denial of equal protection in violation of the Fifth and Fourteenth Amendments. Plaintiff also seeks reimbursements for property taxes and special assessments made on the property. Defendant has moved for summary judgment on all claims (document #69).

Plaintiff has owned the lot at issue since 1972 and became interested in building a single-family home on her lot and obtained a residential allocation for the construction of a house on her lot from Washoe County in 1989. Plaintiff's property is located on what is known as

a "Stream Environment Zone" (SEZ).[1] Such zones are subject to a non-degradation (and restoration) standard due to the integral function they serve in the cleansing of runoff and the achievement of regional water quality goals and standards.[2]

The relevant regulation affecting plaintiff's ability to build is TRPA's 1987 Regional Plan. The plan allows no new land coverage or other permanent land disturbance within stream zones, with very limited exceptions such as for public outdoor recreation facilities and certain public service facilities.

The Individual Parcel Evaluation System (IPES) excludes SEZ's from evaluation or alternatively mandates a score of zero (i.e. a prohibition of new land coverage.)[3] However, under the 1987 Plan, owners of property with a residential development right may transfer such right to another parcel. Plaintiff has not applied to TRPA to transfer from her parcel to another parcel either a residential dwelling unit, land coverage or a development allocation. Defendants claim that the fact that plaintiff has not applied for such a transfer of development rights precludes her from alleging a takings claim at this juncture for lack of ripeness.

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[1] Plaintiff does not argue this categorization.

[2] The parties and Court are well aware of the history, purposes and functions of the TRPA and the interstate compact; it is therefore unnecessary to chronicle these subjects in this order. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1319-1320 (D.Nev. 1992).

[3] It is uncontested that Plaintiff appealed her parcel evaluation (a score of zero) which prohibited her from building on her lot.

With regard to the claim for reimbursement of fees, taxes and assessments (Fifth Claim for Relief) Plaintiff acknowledges that TRPA is not the correct defendant for this claim and the action is dismissed. However, with regard to the remaining claims the threshold issue of ripeness must be decided before proceeding further. The Court is unable to make such a determination of ripeness with the information before it. The only issue in this case is whether or not plaintiff must pursue her development transfer rights in order to present a ripe claim to this Court. The briefings by the parties do not make clear what these rights are or the procedures for obtaining such rights.

The Court understands that plaintiff may not develop or build on the parcel of land she owns and that no developmental rights may be transferred *to* the property at issue. While Defendants correctly assert that the courts have previously listed the application for transfer of development rights as a prerequisite to stating a ripe takings claim, such a prerequisite has always been listed among other avenues that had not yet been pursued by plaintiffs or in our dicta. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 & n.6 (D.Nev. 1986), *vacated in part on other grounds*, 911 F. 2d 1331 (9th Cir. 1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied* ___ U.S. ___, 111 S. Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992); *Tahoe Sierra Preservation Coun. v. Planning Agency*, 808 F. Supp. 1474, 1483 (D.Nev. 1992) *appeal pending* Ninth Circuit Docket No. 93-15113.

In this case the Court is concerned because the transfer of rights is the *only* avenue not yet pursued, the plaintiff cannot transfer any rights *to* the property at issue,

and there is no evidence of any property appropriate for such transfer. There is also a question as to exactly what rights may be transferred in this case and what benefit or value there is to a transfer. The only development right known to this Court is the allocation right granted by Washoe County.

Defendants claim that an application for transfer is the only "meaningful application" that can be made in this case. This Court would like the "meaningfulness" of this application explained. The question of whether or not a transfer of development rights constitutes a "use" of property can then be determined. An explanation as to how plaintiff can pursue the right to transfer development and how that is meaningful to the use of the property at issue is necessary. The dicta of the numerous cases aside, the Court requests that the parties address this issue specifically in briefs explaining what development rights can be transferred in plaintiff's case and the procedures, prerequisites and value of such transfer as applicable in this case.

IT IS THEREFORE HEREBY ORDERED that the parties shall file concurrent briefs on the issue of the transfer of development rights as applicable in this case (and described in the paragraph above) by December 8, 1993. Concurrent replies shall be filed no later than December 22, 1993.

DATED: November 23, 1993.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

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Filed 12/08/93

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM Plaintiff, v. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA, Defendants.	)	**CASE NO. CV-N-91-040-ECR** **DEFENDANT TAHOE REGIONAL PLANNING AGENCY'S MEMORANDUM CONCERNING ITS TRANSFER OF DEVELOPMENT PROGRAM**

Defendant Tahoe Regional Planning Agency (TRPA) respectfully submits this memorandum concerning its transfer of development program in response to this Court's order requesting information concerning the program, filed November 23, 1993.

I

BACKGROUND

In its order filed November 23, 1993, this Court requested the parties to address what development rights plaintiff Bernadine Suitum (Suitum) can transfer from her property, the procedures and prerequisites for transfer, and the value of such transfer rights.

Order at 5. This memorandum, in response to that order, attaches affidavits, including exhibits, to explain TRPA's Transfer of Development Rights (TAR) program and explore its potential value to a plaintiff such as Suitum. The *actual* benefits of the program for Suitum's property, however, can only be known if she pursues an appropriate application. As a result, there is a measure of inevitable speculation in the information we respectfully submit to this Court.

We trust that nonetheless will assist the Court in better understanding He program at issue.[4]

II

TRPA'S PROGRAM FOR TRANSFER OF DEVELOPMEN[T5]

A

General. TRPA's TDR program involves the transfer of land coverage, transfer of residential development rights and residential allocations. *See generally* Barnett Aff. The applicable chapters of the TRPA Code of Ordinances ("TRPA Code") are 20, 21, 34 and 35. Id., ¶ 14. The latter were adopted in May 1987, as a part of TRPA's 1987 Regional Plan, and became effective July 26, 1987. *Ibid.*

Numerous transfers of land coverage, residential development rights and allocations have been approved since implementation

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[4] Because of the length and detail of the affidavits attached to this memorandum, the memorandum itself shall only be in summary form to assist the Court in gleaning the necessary information from the sworn testimony.

[5] The details of TRPA's TDR program are set forth in the Affidavit of Lyn Barnett ("Barnett Aff," attached hereto and incorporated herein as Exhibit "A". Mr. Barnett currently serves as a Senior Planner in TRPA's project review division. Barnett Aff., ¶ 1. He has been employed by the project review division since January 1987 and is familiar with TRPA's transfer rules. *Id.*, ¶12.

of TRPA's 1987 Regional Plan. Barnett Aff., ¶ 12. Applications are routinely processed by TRPA, with transfers conditioned upon permanent retirement of the transferring parcels, such as ones classified as Stream Environment Zone. Retirement is accomplished by deed restrictions or transfers to an entity which will maintain the parcel as permanent open space. Barnett Aff., ¶ 12.

B.

Transfers of Land Coverage. Under Chapter 20 of the TRPA Code, Suitum is eligible to transfer land coverage from her parcel to a receiving parcel located in the Incline Hydrologic Area, denoted Hydrologic Area No. 1. Barnett Aff., ¶ 5. Classified as Stream Environment Zone, Suitum's parcel is allowed one percent (1 %) land coverage, which will allow her approximately 183 square feet of land coverage eligible for transfer. *Id.*, ¶ 6. The coverage attributable to Suitum's parcel may be transferred to another parcel for a residential, public service or a recreation project in Hydrologic Area No. 1. *Id.*, ¶ 7.

C

Transfers of Residential Development Rights. Suitum's parcel has been assigned one residential development right under the1987 Plan. Subject to approval by the county and the use and density eligibility of the receiving parcel, that right may be transferred anywhere in the Tahoe region. Barnett Aff., ¶ 8. Certain projects *require* transferred residential development rights. They include duplexes, apartments and other multi-residential projects, as well as guest houses. *Id.*

Under Chapter 35 of the TRPA Code, retirement of a parcel classified as Stream Environment Zone, such as Suitum's, entitles the owner to transfer not only one residential development right but three multi-residential bonus units as well. As a result, a project applicant could purchase four bonus develop rights from Suitum for construction of a multiresidential project on a receiving parcel appropriately zoned for that use. Barnett Aff., ¶ 9.

D

Transfer of Residential Allocations. Under Chapter 34 of the TRPA Code, Suitum is also entitled to transfer a residential allocation. Barnett Aff., ¶ 10. Subject to county approval and use

and density eligibility of the receiving parcel, residential allocations may be transferred anywhere in the Tahoe Region. Ten percent of Washoe County's residential allocations are reserved for parcels below the IPES line, such as Suitum's. Id., ¶ 11. Six allocations thus will be reserved in Washoe County for parcels below the IPES line. The allocations will be selected through a random drawing. *Ibid.*

III

VALUE ATTRIBUTABLE TO TRANSFER RIGHTS[6]

Stephen Johnson's affidavit discusses the value of the transfer rights pertaining to Suitum's property. In addition to the transfer value, the affidavit also considers value attributable to the lot through sale to adjacent property owners for open space and privacy, as well as sale to a governmental entity. (Plaintiff has declined an offer to purchase her property by the State of Nevada for the sum of $35,000.)

The Johnson Affidavit estimates the value of a residential development right as between $1,500 and $2,500. Johnson Aff., Ex. "bb" (third page). Having one residential development right plus three bonus units, Suitum's lot has a development unit transfer value of between $6,000 and $10,000.

Mr. Johnson indicates that land coverage from a zero IPES score lot in Washoe County could be sold for between $6.00 and $12.00 per square foot *Id.* Applying those figures to the 183 square feet available for transfer on Suitum's lot (Barrett Aff.,

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[6] Attached to this memorandum as Exhibit "B" is the Affidavit of appraiser Stephen R. Johnson (Johnson Aff. "). Mr. Johnson has been a member of the American Institute of Real Estate Appraisers since 1976 and a Senior Real Estate Analyst, Society of Real Estate Appraisers, since 1984. Ex. "aa" to Johnson Aff., p.1. He has worked as a real estate appraiser in the Tahoe Region for 24 years. Johnson Aff., p.1. The remainder of his qualifications are set forth on Exhibit "act" to his affidavit.

¶ 6), transfer of the land coverage could produce between $1,098 and $2,196.

Mr. Johnson also states that transfer of Suitum's development right along with a development allocation could potentially produce between $30,000 and $35,000. *See* Johnson Aff., Ex. "bb" (third page).

Finally, once the rights have been transferred from the parcel, Mr. Johnson estimates that lots with zero IPES scores in the Washoe County portion of the Lake Tahoe Basin sell in the range of $7,125 to $16,750. *Id.*, Ex. "bb" (third & fourth pages).

IV

CONCLUSION

TRPA respectfully submits its TDR program is a meaningful, realistic course of relief for the plaintiff. Moreover, as the Johnson Affidavit demonstrates, plaintiff's land likely retains significant residual value as an adjunct to the transfer remedies.

Plaintiff ought to be required to pursue the TDR program before the merits of her takings and other claims are adjudicated. Absent that pursuit, the Court will not know the actual economic impact of the contested regulations and their effect on plaintiff's reasonable investment-backed expectations. For example, absent transfer, the Court can only speculate on whether TRPA's regulations have diminished the value of her land and the extent of the diminution if any.[7] Both federal and state courts have recognized that transferable development rights mitigate financial burdens of zoning regulations and must be borne in mind when considering the economic impact of a regulation. See *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978);

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[7] Even then, it is settled that diminution in value caused by a zoning ordinance does not alone render the measure invalid. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 131 (and cases cited there reflecting substantial reductions in value); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962); *Haus v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1980).

Deltona Corp. v. United States, 657 F.2d 1184, 1192 n. 14 (Ct. Cl. 1981); *American Savings & Loan v. County of Marin*, 653'F.2d 364, 371 (9th Cir. 1981); *Zilber v. Town of Moraga*, 692 F.Supp. 1195, 1205 (N.D. Cal. 1988); *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal.App.3d 484, 495-499, 188 Cal.Rptr. 191 (1982), *appeal denied*, 464 U.S. 805 (1982).

Moreover, absent plaintiff's pursuit of transfer remedies, the Court cannot realistically assess whether and to what extent TRPA's regulations have frustrated her *reasonable* expecations. That simply cannot be known until values attributable to the transfer program are known.

For the foregoing reasons, therefore, we respectfully submit Suitum's takings, substantive due process and equal protection claims are not ripe for adjudication, rendering summary judgment for TRPA in order.

DATED: December 8, 1993.

CROWELL, SUSICH,
OWEN, TACKES, LTD.

By: /s/ Gary A. Owen
Gary A. Owen

Attorneys for Defendant

EXHIBIT A TO TRPA MEMORANDUM 12/8/93

AFFIDAVIT OF LYN BARNETT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I, LYN BARNETT, hereby declare as follows:

1. I am currently employed by the Tahoe Regional Planning Agency (TRPA) as a Senior Planner in the Project Review Division.

2. I have been employed by TRPA in the Project Review Division since January 1987 and as such am familiar with the ordinances and application processes for transfers of land coverage, development rights and allocations and have reviewed and approved applications for such projects.

3. I have read and relied upon that portion of the complaint in Suitum v. Tahoe Regional Planning Agency, Case No. CV-N-91-040-HDM, wherein Mrs. Suitum described her property as APN 130-211-30, located in Incline Village, Washoe County, Nevada, which parcel received an IPES score of zero and is classified as a stream environment zone.

4. Chapters 20, 21, 34 and 35 of the TRPA Code were adopted by the Governing Board at its May 27, 1987 meeting and became effective, pursuant to the terms of the adopting ordinance, Ordinance 87-4, and Article VI(a) of the Compact, sixty days later on July 26, 1987.

TRANSFERS OF LAND COVERAGE

5. Chapter 20 allows a property owner, such as Mrs. Suitum, to transfer the land coverage from her parcel to an eligible receiving parcel in the Tahoe Region. A property owner may only transfer coverage to another receiving parcel within the same hydrologically related area as the sending parcel (see TRPA Code Section 20.3(C)(5)). There are nine hydrologically related areas in the Tahoe Region. This means that a property owner, such as Mrs. Suitum, located in the Hydrologic Area 1 (Incline), is eligible to transfer her coverage to any parcel within the approximately 14,106 acres of the Incline Hydrological Area.

6. The Suitum parcel is claasified as land capability district lb (Stream Environment Zone) by TRPA'a Land Capability System and Individual Parcel Evaluation System. As a stream environment

zone, the property owner is allowed one percent (1%) base coverage. The county assessor records indicate the Suitum parcel is approximately 18,300 square feet in size. This means that Mrs. Suitum has the ability to transfer 183 square feet of coverage (1% of 18,300 square feet) to another parcel for construction of a larger project on the receiving parcel.

7. The amount of coverage which can be transferred to a project depends upon the use classification of the project and the land capability rating of the receiving parcel. TRPA approves transfers of coverage in conjunction with the approval of a project on the receiving parcel. Transfers of coverage are required for certain types of projects such as: 1) Residential projects which exceed the maximum parcel coverage specified in Section 20.3.B(l)(a), 2) Highways, streets, and roada which exceed allowable land coverage limits; 3) Planned unit developments which exceed allowable land coverage limits, as specified in Section 20.3.(B)(l)(b); 4) Driveways which cause the parcel 'e coverage to exceed allowable land coverage limits; and 5) Public works projects which exceed the allowable land coverage limits. The base coverage for vacant parcels, such as Mrs. Suitum's, is termed "potential coverage" became the coverage does not physically exist. Potential coverage may be tranaferred to residential, public service and recreation projects in the cam. hydrologic area t in this instance, Hydrologic Area 1 (Incline). A true and correct excerpt of Section 20.3.C titled Manner of Transferring Land Coverage is attached hereto as Exhibit B "aa".

TRANSFERS OF RESIDENTIAL DEVELOPMENT RIGHTS

8. Chapter 21 (Section 21.6) of the TRPA Code provides for the assignment of residential development rights to vacant parcels existing on the effective date of the Regional Plan, July 1, 1987. Under the Regional Plan, the Suitum parcel is assigned one residential development right. Chapter 34 provides for the transfers of residential development rights in Section 34.2. Subject to County approval and use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Tahoe Region. Transferred residential development rights are required for projects proposing residential density in excess of one residential unit per parcel, such as duplexes, apartments, other multi-residential projects,

and guest houses. A true and correct copy of Section 34.2 is attached hereto as Exhibit "bb..

BONUS RESIDENTIAL RIGHTS

9. Chapter 35 provides for the assignment of bonus residential development rights (known as multi-residential bonus units) to projects which have resulted in the retirement of sensitive parcels, such as abeam environment zones. Retirement of a parcel classified as a abeam environment zone, such as Mrs. Suitum's, qualifies the receiving project for the assignment of three multi-residential bonus units. By transferring a residential development right from a abeam environment zone parcel, such as Mrs. Suitum's, a project applicant would have four bonus development rights (one from the retired parcel and three bonus development rights) for use on an eligible receiving parcel. These four development rights (coupled with the project applicant's four building allocations) would permit project applicant to construct four new residential units in the Tahoe Region. A true and correct copy of Section 35.2 is attached hereto as Exhibit "cc".

TRANSFER OF RESIDENTIAL ALLOCATIONS

10. Chapter 34 also provides for transfer of residential allocations from a parcel with a low IPES score (such as Mrs. Suitum's) to any parcel with an IPES score above 694[1]. Subject to County approval and use and density eligibility of the receiving parcel, residential allocations may be transferred anywhere in the Tahoe Region. Residential allocations are limited to 300 per year in the Tahoe Region and are required for construction of new residential units. A true and correct copy of Section 34.3 is attached hereto as Exhibit "dd".

11. Ordinance 93-19, adopted by the Governing Board at its regular November meeting on November 17, 1993, requires TRPA to reserve ten percent of each jurisdiction's residential allocations for distribution to parcels below the IPES line in that

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[1] The 694 Washoe County IPES line will take effect on February 16, 1994. Until that time, the Washoe County IPES line is set at 725.

jurisdiction. The IPES line in Washoe County is currently 725. This means that a parcel must currently have a score of 726 or better to be eligible for construction. Thia ordinance allows residential parcel owners with parcels below the IPES line, such as Mrs. Suitum, to compete for an allocation. If she were to obtain an allocation, she could transfer the allocation to an eligible receiving parcel. In Washoe County, six allocations will be reserved for allocation transfers in 1994 to parcel with IPES scores below 694. TRPA distributes the residential allocations for parcels below the IPES line through a random drawing of parcels. A similar program was implemented in 1993 pursuant to TRPA Ordinance 92-20 and TRPA Resolution 92-32. A true and correct copy of Ordinance 93-19 is attached as Exhibit "ee".

12. Numerous transfers of coverage, residential development rights and allocations have been approved since the implementation of the 1987 Regional Plan. Such applications can be, and are, made at any time and are routinely processed and approved under the TRPA Code. Transfers are conditioned on the permanent retirement of the sending parcel if the sending parcel is classified as sensitive, such as a stream environment zone parcel. Permanent retirement can be accomplished by such means as deed restrictions or transfer of the parcel to an entity which will maintain the parcel as permanent open apace.

13. A copy of the application form that la used for land coverage transfers, development right transfers and allocation transfers is attached as Exhibit "ff".

14. All of the excerpts of the TRPA Code of Ordinances are public records pursuant to Article III(i) of the Tahoe Regional Planning Compact.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Roundhill, Nevada on December 7, 1993.

/s/ Lyn Barnett
Lyn Barnett, Senior Planner

EXHIBIT "aa" TO BARNETT AFFIDAVIT

20.3.C Manner Of Transferring Land Coverage: Land coverage transferred to eligible parcels for eligible uses prescribed by Subsection 20.3.B, shall be transferred in the manner set forth in this Subsection. A transfer of land coverage may be from one parcel to another and may occur in connection with TRPA's approval of: a project; a community plan; redevelopment plan; a specific or master plan; or a transfer of coverage program for a subdivision. Transfers shall be recorded in accordance with Chapter 38, shall not result in land coverage on eligible parcels in excess of the maximum amounts prescribed by Subsection 20.3.B, and shall be in accordance with the provisions of this chapter. Transfers may be undertaken in connection with Chapter 34. Removal of existing land coverage without transfer in connection with a project, in the manner and as otherwise required by this chapter, may be accomplished, by crediting the coverage account of the pertinent parcel pursuant to Chapter 38. Land coverage banks may be designated by TRPA pursuant to Chapter 38, which banks may provide a supply of land coverage to accommodate individuals needing coverage for transfer purposes.

(1) Land Coverage Transfer Ratios: Land coverage transferred from one parcel ("sending parcel") to another parcel ("receiving parcel") shall be in accordance with the following ratios:

(a) General: Except for transfers relating to commercial uses within approved community plans, the transfer of one square foot of land coverage to a receiving parcel requires the retirement of one square foot of land coverage on the sending parcel (1:1 transfer ratio).

(b) Commercial Uses Within Approved Community Plans: Receiving parcels within approved community plans, upon which there exist commercial facilities, shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), up to the

maximum 50 percent land coverage prescribed by Subparagraph 20.3.B(2)(b). Undeveloped receiving parcels within approved community plans, eligible for the maximum 70 percent land coverage prescribed by Subpara--graph 20.3.B.2(a), shall be eligible to receive transferred land coverage at the ratio prescribed by Subparagraph 20.3.C(l)(a), until the total land coverage reaches 50 percent of the project area. Undeveloped parcels shall be eligible to receive additional transferred land coverage in excess of the 50 percent limit, until the total land coverage reaches the maximum 70 percent, provided the additional coverage over 50 percent shall be transferred at the ratio set forth in the following chart:

Percent of Final Coverage	Transfer Ratio
51	1.05:1
52	1.1:1
53	1.15:1
54	1.2:1
55	1.25:1
56	1.3:1
57	1.35:1
58	1.4:1
59	1.45:1
60	1.5:1
61	1.55:1
62	1.6:1
63	1.65:1
64	1.7:1
65	1.75:1
66	1.8:1
67	1.9:1
68	1.95:1
70	2:1

Transfer Example:

Five Acre Parcel - 217,800 sq. ft
Allowable Base Coverage = 30% = 65,340 sq. ft.
Proposed Project Coverage = 60% = 130,680 sq. ft.

Transfer Requirement

O to 30% - None =	0
30 to 50% - 1:1 =	43,560 sq. ft.
50 to 60% - 1.5:1 =	32,670 so. ft.
Total Coverage to be transfered	76,230 sq. f t.

(2) Types Of Land Coverage Eligible For Transfer: The following types or classes of legally established land coverage are eligible for transfer to receiving parcels in accordance with the provisions of this Chapter:

(a) Hard Coverage: Hard land coverage may be transferred in all cases.

(b) Soft Coverage: Soft land coverage may be transferred in all cases, except for transfers relating to commercial or tourist accommodation uses or facilities.

(c) Base Coverage: Unused allowable base land coverage referred to in Subsection 20.3.A may be transferred in all cases, except for transfers relating to commercial uses or facilities. Land coverage transferred as mitigation for excess coverage associated with commercial and tourist accommodation projects shall be existing hard coverage except as provided in Subparagraph 20.3.C(6).

(d) Coverage For Single Family House: Coverage transferred for a single family house, including, but not limited to, a house to be constructed pursuant to IPES, shall be from a sending parcel as environmentally sensitive as, or more environmentally sensitive than, the receiving parcel. If both sending and receiving parcels have not received IPES rating scores, relative environmental sensitivity shall be determined by comparing the land capability classification of each parcel. If both parcels have IPES rating scores, sensitivity shall be determined by comparing the scores of each. If one parcel has an IPES

rating score and the other does not, TRPA shall determine sensitivity.

(e) Coverage for Water Quality Control Facilities: Land coverage transferred for water quality control facilities pursuant to Subsection 20.3.B(8) shall be in acordance with (a) through (c) above, or shall be mitigated through restoration in accordance with Subsection 20.4.C, in the amount of 1.5 times the area of land covered or disturbed for the project beyond that permitted by the coefficients in Subsection 20.3.A.

(3) Sending Parcels Classified As Sensitive Lands (Lands Capability Districts 1-3): If land coverage is transferred from a sending parcel that is located, in whole or in part, in Land Capability Districts 1 through 3, inclusive, or is at or below the initial level defining the top rank under IPES (i.e., 725), the coverage transferred shall be permanently retired in the manner set forth in Subparagraph 20.3.C(7) and may not be returned to the sending parcel.

(4) Sending Parcels Classified As High Capability Lands (Land Capability Districts 4-7): If land coverage is transferred from a sending parcel that is located entirely within Land Capability Districts 4 through 7, inclusive, or is above the initial level defining the top rank under IPES (i.e., 725), land coverage may be returned to the sending parcel subject to the limitations of Subsections 20.3.A and 20.3.B

(5) Hydrologically Related Area Transfer Limitation: For all land coverage transfers, the receiving parcel and the sending parcel shall be in the same hydrologically related area. The hydrologically related area boundaries are depicted upon the TRPA Plan Area Overlays and are incorporated herein. Transfer across said boundaries is prohibited.

(6) Inadequate Supply Of Land Coverage: If TRPA, after conducting a mandatory annual review of the cost of land coverage available at the land bank, finds there is an inadequate supply of hard land coverage for commercial or tourist accommodation uses at a reasonable cost within a given hydrologically related area, TRPA may authorize an increase in the supply of land coverage for transfer in the order of priority set forth below. In determining "reasonable

cost," TRPA shall consider: whether there is no market for the coverage due to its cost, limited supply or simple absence of transactions; and other pertinent factors. Prior to authorizing an increase in supply of land coverage, TRPA also shall consider the effect of the increase on the inventory in the land bank and the value of investments made by the bank in hard or soft land coverage. If TRPA authorizes an increase in the supply of land coverage, it shall do so in the following order of priority:

(a) Existing soft coverage as described in the definition of "land coverage."

(b) Unused base coverage, referred to in the Goals and Policies as "potential coverage."

(c) Through redefinition of the boundaries of the hydrologically related area to increase the supply of coverage.

(7) Restoration And Retirement Of Land Coverage: Land coverage shall be restored and retired pursuant to Section 34.5 and the following:

(a) Transfers: TRPA shall ensure that land coverage transferred pursuant to Subsection 20.3.C shall be retired permanently pursuant to the following requirements:

(i) In the event land coverage is removed from the sending parcel, the applicant or a public agency shall restore the sending parcel to a natural or near natural state;

(ii) Provisions for future maintenance and protection of the parcel from further soil disturbance shall be made, whether or not the parcel is undisturbed or subject to restoration; and

(iii) For parcels in private ownership, deed restrictions, or other covenants running with the land, permanently assuring the accomplishment of the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) shall be recorded by the owner. TRPA shall obtain binding assurance from a public agency that the requirements of Subparagraphs 20.3.C(7)(a)(i) and (ii) are permanently met.

(b) Retirement Of Land Coverage For Credit: In the event land coverage is retired on one parcel, but is not proposed for immediate transfer to another parcel, the applicant shall comply with Subparagraph 20.3.C(7)(a)(i) and (ii), to assure credit for the retired coverage in accordance with Chapter 38.

(8) Land Bank: Land coverage transfers and land coverage retirement programs may use a land bank pursuant to Chapter 38.

EXHIBIT "bb" TO BARNETT AFFIDAVIT

CHAPTER 34
TRANSFER OF DEVELOPMENT

Chapter Contents

34.0 Purpose
34.1 Applicability
34.2 Transfer Of Residential Development Right
34.3 Transfer Of Residential Allocations
34.4 Transfer Or Relocation Of Existing Development
34.5 Restriction Or Retirement Of Parcels
34.6 Basic Service Requirements

34.0 Purpose: This chapter sets forth the provisions for the transfer of residential development rights, residential allocations, and existing development, from one parcel to another as provided in the Goals and Policies, Development and Implementation Priorities Subelement, Implementation Element, Goal #3, Policies 1 - 5. The transfer of land coverage is addressed in Chapter 20.

34.1 Applicability: This chapter applies to the transfer of residential development rights, residential allocations, and existing development. All such transfers require TRPA approval. Transfer of a residential development right or allocation does not constitute a project approval. Transfers of existing development can occur only in conjunction with a project.

34.2 Transfer Of Residential Development Right: A residential development right, as defined in Chapter 2, may be transferred to another parcel pursuant to the following provisions:

34.2.A Vacant Parcel: The parcel from which the right is transferred shall be vacant and have a residential development right;

34.2.B Parcel Retirement: The parcel from which the development right is transferred is retired pursuant to Section 34.5 at the time of transfer;

34.2.C Receiving Area: The parcel receiving the development right shall be in a plan area or community plan where residential uses are permissible and shall meet the following criteria:

(1) Parcels Eligible To Receive One Or More Development Rights: Parcels located in a plan area or community plan designated as a receiving area for multi-residential units shall be eligible to receive one or more development rights, or

(2) Parcels Eligible To Receive One Development Right:

(a) One development right may be transferred to a parcel for the purpose of constructing a secondary residence, provided the building site for the secondary residence is in Land Capability Districts 4, 5, 6 or 7.

(b) One development right may be transferred to a parcel that was not assigned a development right provided the parcel has a building site in Land Capability Districts 4, 5, 6 or 7, or, if applicable, is in the top rank under IPES.

34.2.D Density: The transfer complies with the density of use provisions for the receiving parcel;

34.2.E Local Approval: The approval of affected local governments shall be obtained;

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance

districts 1, 2, 3, or 4; below the top rank IPES line, if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transferred.

EXHIBIT "cc" TO BARNETT AFFIDAVIT

CHAPTER 35

BONUS UNIT INCENTIVE PROGRAM

Chapter Contents

35.0 Purpose
35.1 Applicability
35.2 Multi-Reeidential Incentive Program
35.3 Tourist Accommodation Bonus Unit Program
35.4 Determination of Project Cost

35.0 Purpose: This chapter sets forth provisions for assigning multi-residential and tourist accommodation bonus unite in accordance with the Goals and Policies, Land Use Element, Land Use Subelement, Goal #2, Policies SA and 5B, and Implementation Element, Development and Implementation Subelement, Goal #2, Policies 2F and 3, and Goal #3, Policies 1 and 2.

35.1 Applicability: The assignment of mplti-residential and tourist accommodation bonus units shall comply with the provisions set forth in this chapter. Such assignments shall occur only in conjunction with a project approved by TRPA.

35.2 Multi-Residential Incentive Program: Multi- residential bonus units may be approved for use only on parcels located in plan areas or community plane designated as eligible for the Multi-Residential Incentive Program.

35.2.A Assionment Of Bonus Units: Pursuant to Chapter 13, a maximum of 1,600 multi-residential bonus units shall be assigned to plan areas.

35.2.B Criteria: All projects receiving multi-residential bonus units pursuant to this chapter shall comply with the following criteria:

(1) The proposed density, including any multi-residential bonus units, shall not exceed the maximum density limits set forth in the plan area statement, applicable community or redevelopment plan, or this Code.

(2) Multiple family dwellings shall be designated in the plan area or community plan as an allowed use, or a special use for which the findings required in Section 18.1 have been made.

(3) The project shall be located within a plan area or community plan designated as eligible for the Multi-Residential Incentive Program.

(4) The multi-residential bonus units received by the project shall not exceed the number of multi-residential bonus units assigned to the plan area or community plan in which the project is located.

(5) Except for affordable housing units, an allocation shall be required pursuant to Chapter 33 in order to utilize multi-residential bonus units.

35.2.C Determination Of The Number Of Bonus Units: Applications for projects proposing the use of residential bonus units shall include a list and description of all mitigation measures identified in Subsection 35.2.D that are proposed as part of the project. Based on review of the list and description of the mitigation measures proposed, TRPA shall determine a score for the project in accordance with Subsection 35.2.D. One residential bonus unit may be approved for each ten points received by a project. Bonus units, so determined, may be reserved for projects based on the proposals submitted prior to project approval to enable applicants to accumulate allocations. Bonus units shall be assigned to a parcel and may be reserved as credits, unused, for no more than five years. TRPA may reissue those credits to the same parcel for an additional five years, if TRPA finds that the bonus units are likely to be used during that period.

(1) Projects Within A Community Plan: The score received pursuant to Subsection 35.2.D by projects located within an approved community plan shall be multiplied by a factor of 1.5; or

(2) Projects Providina Affordable Emolovee Housing: The score received pursuant to Subsection 35.2.D by projects designed to provide affordable employee housing shall be multiplied by a factor of 2.0.

(3) Post-1987 Projects Pronosina Subdivision of Units: In order to subdivide a post-1987 multi-residential project which does not meet the standards for low cost housing as defined in Subsection 41.2.F, the score received pursuant to Subsection 35.2.D shall be multiplied by a factor of .67.

35.2.D Mitigation Measures: Projects proposing the use of multi-residential bonus units shall receive a score only when one or more of the following mitigation measures are proposed as part of the project. Any combination of the listed measures may be proposed. Only those mitigation measures that would not otherwise be required by the Code shall be considered in determining the score received by a project. This subsection establishes the maximum number of points that may be awarded for each mitigation measure. When a mitigation measure satisfies the requirements of two or more of the mitigation measures listed below, points shall be awarded based on the mitigation measure resulting in the highest score. The total point score shall be rounded down to a number which is a multiple of ten.

(1) Participation in a Capital Improvements project included in the Action Element of TRPA's Regional Transportation Plan-- (project cost divided by $5,000) x 10 points.

(2) Participation in a Capital Improvements project included in TRPA'a Water Quality Management Plan--(project coat divided by $5,000) x 10 points.

(3) Provision of stream zone restoration pursuant to TRPA's Stream Environment Zone Restoration

Program (excluding restoration required as mitigation for new SEE disturbance)--(project cost divided by $5,000) x 20 points.

(4) Retirement, in accordance with Chapter 34, of an undeveloped parcel located in Land Capability Districts 1a, 1b (SEZ), 1c, 2, or 3:

(a) If the parcel is in Land Capability Districts la, lo, 2, or 3--10 points per transferred unit.

(b) If the parcel is in Land Capability District 1b or in a stream environment zone--30 points per transferred unit.

(5) Transfer of existing residential unit and retirement of the parcel in accordance with Chapter 34:

(a) If the parcel is in Land Capability Diatricts la, lo, 2, or 3 - 10 points per transferred unit.

(b) If the parcel is in Land Capability District lb or in a stream environment zone - 40 points per transferred unit.

(6) Provision of public access to recreation arena, lakes, streams, or vista points to which access was previously nonexistent - (project cost divided by 55,000) x 10 points (maximum 50 points).

(7) Projects proposing leea land coverage than the maximum amount otherwise allowed in accordance with Chapter 20 shall receive one point for each such reduction of 600 square feet onsite.

(8) Participation in projects identified in the TRPA approved Scenic Restoration Program - (project coat divided by S5,000) x 10 points.

35.2.E Affordable Housing: Housing meeting the criteria for affordable or government assisted housing as set forth in policies 1, 3 and 4 of Goal 1 of the Housing

Subelement are not subject to 35.2.D. Bonus units for such projects are assigned on the brain of project need.

EXHIBIT "dd" TO BARNETT AFFIDAVIT

34.3 Transfer of Residential Allocations: If, pursuant to Chapter 33, a parcel is assigned a residential allocation, the allocation may be transferred to another parcel, pursuant to the following provisions and the provisions of Section 36.4 if applicable.

34.3.A Parcel Classification: The allocation transfer is from a parcel determined to be in Land Capability Districts 1a, 1b, 1c, 2 or 3; shorezone tolerance districts 1, 2, 3, or 4; below the top rank IPES line if applicable; or unsuitable for development due to the inability of the property to meet TRPA or local government development standards.

34.3.B Building Site: The receiving parcel has a building site that is determined to be in Land Capability Districts 4, 5, 6, or 7; or, if applicable, in the top rank under IPES.

34.3.C IPES Limitation: No allocation shall be transferred to any parcel that is below the initial level defining the top rank under IPES unless the number of vacant parcels in the top rank at the time of the proposed transfer is less than 1/2 the total inventory in that jurisdiction;

34.3.D Permissible Use: The receiving parcel is in a plan area or community plan where residential uses are permissible use on the receiving parcel.

34.3.E One Transfer: Subject to the limits in Chapter 33, an allocation may be transferred only one time and shall continue to count against the jurisdiction to which it was originally issued.

34.3.F Local Approval: The approval of affected local governments shall shall be obtained.

34.3.G Parcel Retirement: The sending parcel is retired pursuant to Section 34.5 at the time the allocation is transfered.

EXHIBIT "ee" TO BARNETT AFFIDAVIT

TAHOE REGIONAL PLANNING AGENCY
ORDINANCE NO. 93-19

AN ORDINANCE AMENDING ORDINANCE NO. 87-9, AS AMENDED, OF THE TAHOE REGIONAL PLANNING AGENCY; AMENDING CHAPTER 33 OF THE CODE OF ORDINANCES RELATING TO DISTRIBUTION OF ALLOCATIONS TO PARCELS BELOW THE IPES LINE; AND PROVIDING FOR OTHER MATTERS PROPERLY RELATING THERETO.

The Governing Board of the Tahoe Regional Planning Agency does ordain as follows:

Section 1.00 Findings

1.10 It is necessary and desirable to amend TRPA Ordinance No. 87-9, as amended, by amending Chapter 33 of the Code of Ordinances relating to distribution of residential allocations to parcels below the IPES line in order to further implement the Regional Plan pursuant to the Goals and Policies Plan, Goal #3, Policy 4, Development and Implementation Priorities Subelement, and Article VI(a) and other applicable provisions of the Tahoe Regional Planning Compact.

1.20 The Advisory Planning Commission ("APC") conducted a public hearing and recommended adoption of the amendments. The Governing Board has also conducted a noticed public hearing on the amendments. Oral testimony and documentary evidence were received and considered.

1.30 The proposed amendments have been determined not to have a significant effect on the environment and are exempt from the requirement of an environmental impact statement pursuant to Article VII of the Compact.

1.40 The Governing Board finds that, prior to the adoption of this ordinance, the Board made the findings required by Section 6.5 of the Code and Article V(q) of the Compact.

1.50 The amendments adopted by this ordinance continue to implement the Regional Plan, as amended, in a manner that attains and maintains the environmental thresholds as required by Article V(c) of the Compact.

1.60 Each of the foregoing findings is supported by substantial evidence in the record.

Section 2.00 Amendment of Chapter 33 of the Code

Subparagraphs (a), (c) and (d) of Subsection 33.2.B(1) are hereby amended with added language underlined and deleted language stricken as follows:

(a) TRPA shall reserve 10 percent of each jurisdiction's ~~1993~~/1994 allocations for distribution to parcels below the IPES line. The reserved allocations shall be distributed by a method of random selection by TRPA. A county or city may elect to distribute the reserved allocations provided TRPA fends the substitute system provides for an equal or superior opportunity for participation of parcels below the IPES line.

(c) A complete application for transfer of a reserved allocation shall be filed no later than June 1, ~~1993~~/1994. Transfers of allocations shall be deemed complete when the applicant has received a TRPA notice of eligibility for the transfer and the original allocation form has been signed by the owners of the transferor and transferee parcels, and TRPA. The signatures of the receiving and sending county or city shall be required for interjurisdictional transfers.

(d) Upon transfer of a reserved allocation, a complete application for an additional residential unit shall be filed no later than December 31, ~~1993~~ /1994. Failure to submit a complete application for transfer by June l, ~~1993~~/1994 or to file a complete application for a new residential unit by December 31, ~~1993~~/1994 shall result in the forfeiture of the allocation to the Jurisdiction of origin.

Section 3.00 Interpretation and Severability

The provisions of this ordinance and the amendments to the Code adopted hereby shall be liberally construed to effect their

purposes. If any section, clause, provision or portion of this ordinance or the amendments adopted hereby is declared unconstitutional or invalid by a court of competent jurisdiction, the remainder of this ordinance or the amendments shall not be affected. For this purpose, the provisions of this ordinance and the amendments are hereby declared respectively severable.

Section 4.00 Effective Date

This ordinance shall become effective 60 days after its adoption.

PASSED and ADOPTED by the Governing Board of the Tahoe Regional Planning Agency at a regular meeting held November 17, 1993, by the following vote:

Ayes: Mr. Klein, Ms. Lau, Mr. Sevison, Mr. Bradhurst, Ms. Neft, Mr. DeLanoy, Mr. Waldie, Ms. Bennett, Ms. Hagedorn, Mr. Cronk, Mr. Westergard, Mr. Upton, Mr. Kanoff, Mr. Chimaruati

Nays: None

Abstentions: None

Absent: None

/s/ Wayne Chimarusti
Wayne Chimarusti, Chairman
Tahoe Regional Planning Agency

(Certificate of Service by Mail omitted in printing.)

EXHIBIT "ff" TO BARNETT AFFIDAVIT 12/9/93

TAHOE REGIONAL PLANNING AGENCY

P.O. Box 1038
195 U.S. Highway 50 Zephyr Cove, Nevada (702) 588-4547
Round Hill, Zephyr Cove, Fax (702) 588-4527
NV 89448-1038

Type of Transfer (Check Applicable Box)

__ Land Coverage Transfer
__ Existing Development Transfer (improved parcel)
__ Development Right Transfer (unimproved parcel)
__ Allocation Transfer

TRANSFER DESCRIPTION:

FROM (sending parcel): _____
(APN)

TO (receiving parcel) _____
(APN)

(If more than one receiving parcel list in comment section.)

OWNER(S) OF RECORD (sending parcel):

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____

OWNER(S) OF RECORD (receiving parcel):

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____

PERSON AUTHORIZED TO REPRESENT THE TRANSFER AND TO WHOM ALL CORRESPONDENCE IS TO BE SENT:

Name(s): _____
Phone: _____

Mailing Address: _____ City: _____
State: ___ Zip: _____

LOCATION OF PROPERTY: (Stake property corners of sending and receiving parcels and provide location maps as necessary)

SENDING PARCEL:

County: _____ Subdivision: _____
Lot #: _____

Street: _____
Adjacent parcel Addresses: _____

RECEIVING PARCEL:

County: _____ Subdivision: _____ Lot #: _____

Street: _____
Adjacent parcel Addresses: _____

PROPERTY RESTRICTIONS (List any deed restrictions, easements or other restrictions on property):

Sending Parcel: _____

_____

___

Receiving Parcel: _____

_____

___

PRIOR APPROVALS: (List any prior local or CTRPA/TRPA approvals/permits received for the subject property):

Sending Parcel:

Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Receiving Parcel:

Agency: _____ Permit Type: _____
Date: _____ Permit # _____
Agency: _____ Permit Type: _____
Date: _____ Permit # _____

Is the sending parcel free of nuisance and hazard (i.e., foundations, excavations, spoil piles)? _____ If no, please describe in comment section.

Does the receiving parcel meet the basic service requirements of Chapter 27 of the TRPA Code of Ordinances including but not limited to: 1) served by paved roadway; 2) adequate water rights and water supply system; 3) sewer service; and 4) electrical service? _____
If no, please describe in comment section.

Existing Land Coverage:

Sending Parcel
_____ Square Feet of Hard Coverage
Sending Parcel
_____ Square Feet of Soft Coverage (dirt roads, paths, and parking)

Existing and Proposed Uses of Property:

Sending Parcel

_____
_____

Receiving Parcel _____

_____ _____

Amount of Land coverage to be transferred (if applicable):
_____

Comments:

_____
_____
_____

I hereby declare under penalty of perjury that this application and all information submitted as part of this application, are true, complete, and accurate to the best of my knowledge. Should any information or representation submitted in connection with this application be incorrect or untrue, I understand that TRPA may rescind any approval, or take other appropriate action.

Signed _____

At _____ Dated _____
(Property owner(s)) (County)

AUTHORIZATION FOR REPRESENTATION:

The following person(s) is owner of the subject property (APN _____) or of a sufficient interest therein to make this application:

(Print Owners(s) name(s) _____

_____

If the applicant is not the sole owner of the property, list the names and addresses of the owners and the legal relationship of the applicant to the owner(s) that entitles the applicant to make this application.

_____

_____

As such he/she/they authorize _____
to act as his/her/their representative in connection with this application for the subject property and agree to be bound by said

representative. Any cancellation of this authorization shall not be effective until receipt of written notification of same by TRPA I understand that if this project is approved that I, as the permittee, will be held responsible for any and all permit conditions.

REQUIREMENTS FOR COMPLETE APPLICATION:

_____ _____
Owner's Signature Date

____ 1. Completed Application Form

____ 2. Application Fee

____ 3. Site Plan (if transferring existing coverage)

FOR OFFICE USE ONLY

Date Received: _____
By: _____

Complete Application: _____
By: _____

$240
Filing Fee: [redacted]: _____
Receipt #: _____

EXHIBIT B TO TRPA MEMORANDUM

AFFIDAVIT OF STEPHEN R. JOHNSON IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT

I, Stephen R. Johnson, hereby declare as follows:

1. I am currently a shareholder with Johnson-Wright & Associates, as a professional real estate appraiser.

2. For twnty-four (24) years I have worked as a real estate appraiser in the Tahoe region.

3. I am a certified appraiser in the states of Nevada and California, and my qualifications are set forth in Exhibit "aa," attached hereto and incorporated herein by reference.

4. I am professionally qualified to evaluate and appraise the value of, and the marketability of coverage transfers, allocations and bonus units in the Tahoe area.

5. The December 3, 1993 four page letter addressed to Mr. Gary Owen, Attorney at Law, that is attached hereto as Exhibit "bb", and referenced as though fully set forth herein, reflects my professional judgement on this matter.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Roundhill, Nevada on December 4, 1993.

/s/ Stephen R. Johnson
Stephen R. Johnson, MAI, SREA
Nevada Certified General
License #00003

QUALIFICATIONS OF APPRAISER
STEPHEN R JOHNSON

Professional Designations

MAI - Member American Institute of Real Estate Appraisers - 1976 (Certified through 1992)

SREA - Senior Real Estate Analyst; Society of Real Appraisers - 1984 (Certified through 1994)

State Licensing and Certification

Certified General Appraiser-State of Nevada License #00003 (Certified through 1993) — 1991

Association Memberships and Affiliations

Member Reno Board of Realtors
Member Nevada Association of Realtors
International Right-of-Way Association
Member Nevada State Board of Equalization - (Appointed by Governor Richard Bryan, January 1984 & 1988) — 1984-1991
Member Nevada Commission of Appraisers of Real Estate - (Appointed by Governor Bob Miller, August 7, 1989) — 1989-1991

Offices Held

President, Sierra-Nevada Chapter #60, AIREA - 1989
Vice President, Sierra-Nevada Chapter #60, AIREA - 1988
Secretary; Sierra-Nevada Chapter #60, AIREA - 1987
Vice Governor District 3 (Northern California & Nevada) Society of Real Estate Appraisers (SREA) - 1980-1981
Past President & Membership Chairman - Reno/Carson/Tahoe Chapter #189

Offices Held

Member 1976 Young Men's Council, SREA, Atlanta, Georgia

Discussion Leader 1977 Young Men's Council, SREA, Las Vegas, Nevada
Elected 1 of 2 National Representatives to the International Board of Governors of the SREA, representing the Young Men's Council - 1977
International Professional Practice Committee, SREA - 1978-1981
International Conference Committee, SREA - 1978 & 1979
National Candidates Guidance Committee of the American Institute of Real Estate Appraisers (AIREA) - 1978-1981
Chairman National Division of Member and Chapter Services, AIREA 1981
Board of Directors Northern California Chapter #11, AIREA -1 1980
Admissions Committee, Sierra-Nevada Chapter #60, AIREA
Board of Directors, Sierra-Nevada Chapter #60, AIREA 1984-1986
Board of Directors, Reno-Carson- Tahoe Chapter

Appraisal Experience

Independent Fee Appraiser - 1976 to present
President, Johnson - Wright & Associates (Staff of 11 Appraisers)
Alves Appraisal Associates - 1972-1976
Alves-Kent Appraisal Associates - 1970-1972

Qualified as an Expert Witness

Nevada District Courts:
Washoe County, Carson City,
Douglas County, and Elko County
U.S. Bankruptcy Courts:
Reno, Las Vegas, Sacramento, and Los Angeles
U.S. District Court, San Francisco, California
United States Tax Court
Arizona Superior Court, Maricopa County, Phoenix
Douglas County Board of Equalization
Washoe County Board of Equalization
Nevada State Board of Equalization :
King County Superior Court, Seattle, Washington

Formal Education

Reno High School Graduate - 1966
Bachelor of Science Degree in Business Administration
Majoring in Real Estate, from the University of
Nevada, Reno

Appraisal Education

University of Nevada:
B.A. 430 Real Estate Evaluation
B.A. 432 Real Estate Appraisal Problems 1971
American Institute of Real Estate Appraisers:
Course 1A Basic Appraisal Principles, Methods
& Techniques, San Francisco, CA 1972
Course 1B Capitalization Theory <it Techniques,
San Francisco, California 1973
Course 2 Urban Properties,
San Francisco, California
Course 6 Investment Analysis,
Memphis, Tennessee 1976
Society of Real Estate Appraisers:
Course 301 Special Applications of Appraisal
Analysis, Pomona, California 1974
Numerous Continuing Education Seminars and Courses

Appraisal Instructor

Nevada Association of Realtors

Department of Commerce, Real Estate Division,
State of Nevada
Appraisal "A" Residential Appraising
Appraisal "B" Apartment and Commercial
Property Appraising
Western Nevada Community College
R.E. 206 Real Estate Appraising
Northern Nevada Real Estate School
Real Estate Appraisal

QUALIFICATIONS OF APPRAISER
STEPHEN R JOHNSON
REPRESENTATIVE APPRAISAL
CLIENTS AND PROPERTIES

- CITY OF RENO
- CITY OF SPARKS
- CARSON CITY
- DOUGLAS COUNTY
- LINCOLN COUNTY
- LYON COUNTY
- MINERAL COUNTY
- WASHOE COUNTY
- NEVADA STATE PARK SYSTEM
- NEVADA STATE HIGHWAY DEPARTMENT
- NEVADA STATE DIVISION OF LANDS
- NEVADA ATTORNEY GENERAL'S OFFICE
- U.S. DEPARTMENT OF NAVY
- U.S.. FOREST SERVICE
- FNMA - REGIONAL OFFICE
- INTERNAL REVENUE SERVICE
- FEDERAL TRADE COMMISSION
- WASHOE COUNTY REGIONAL TRANS.
- AIRPORT AUTHORITY OF WASHOE CTY
- PLAZA RESORT CLUB
- J.R.B. DEVELOPMENT COMPANY
- JONNY RIBEIRO BUILDER
- KEEVER CONSTRUCTION COMPANY
- SIERRA PACIFIC POWER COMPANY
- TWIN CITY INDUSTRIAL PARK
- MCCARRAN DUNN IND. PARK
- TREADWAY PARK PROF. CENTER
- NORTH FOOTHILL APARTMENTS
- MEADOWOOD APARTMENTS
- SIERRA WOODS APARTMENTS
- AMESBUFY PLACE APPARTMENTS
- SUNDANCE APARTMENTS
- KEYSTONE SQUARE SHOPPING CTR.
- POZZI MOTORS
- CARS0N CITY
- DATSUN-AMC-JEEP
- TAHOE REGIONAL PLANNING AGENCY

- TAHOE REGIONAL PLANNING AGENCY
- CALIFORNIA ATTY GENERAL'S OFF.
- NEVADA NATIONAL BANK:
- SECURITY PACIFIC BANK - NEVADA
- SECURITY BANK OF NEVADA
- PRIMERIT BANK
- VALLEY BANK OF NEVADA
- BANK OF AMERICA
- THE BANK OF CALIFORNIA
- CROCKER NATIONAL BANK
- WELLS FARGO BANK
- FIB TRUST DEPARTMENT
- B OF A TRUST DEPARTMENT
- FIRST FEDERAL SAVINGS & LOAN
- FIRST WESTERN SAVINGS & LOAN
- AMERICAN SAVINGS AND LOAN
- NEVADA SAVINGS & LOAN
- THE COLDWELL COMPANY
- DILORETO CONST. & DEVELOPMENT
- DERMODY PROPERTIES
- TRAMMELL CROW CO.
- MCKENZIE PROPERTIES
- CALIFORNIA ATTY GENERAL'S OFF.
- NEVADA NATIONAL BANK:
- SECURITY PACIFIC BANK - NEVADA
- SECURITY BANK OF NEVADA
- CHEMETRO
- CITY SERVICES MINERAL CO
- SUPERIOR OIL COMPANY
- TRAVELERS INSURANCE
- FARMERS INSURANCE COMPANY
- FIRST AMERICAN TITLE CO. OF NV
- MERRILL LYNCH RELOCATION
- YOUNG ELECTRIC SIGN COMPANY
- SUGAR BOWL SKI RESORT
- SKI INCLINE RESORT
- KIRKWOOD ASSOCIATES
- NORTHSTAR
- AMFAC MORTGAGE COMPANY
- FRONTIER SAVINGS & LOAN
- HEART FEDERAL SAVINGS & LOAN
- LEWIS HOMES OF NEVADA
- SQUAW VALLEY U.S.A

December 3, 1992

Mr. Gary Owen, Attorney at Law
Crowell, Susich, Owen & Tackes, Ltd
P.O. Box 1000
Carson City, NV 98702

Re: Value Potential for Vacant Single Family Residential Parcels with IPES Scores of zero located in the Washoe County portion of the Lake Tahoe Basin

Dear Mr. Owen:

This letter is in response to your request for a preliminary valuation consultation of the potential value inherent in the transfer of development rights in vacant single family residential lots in the Washoe County portion of the Lake Tahoe Basin with IPES scores of zero.

According to information received from the Tahoe Regional Planning Agency, a vacant single family residential lot with a zero IPES score has one inherent development right and land coverage in the amount of 1% of its total land area. Also, the owner of a zero IPES score parcel is eligible to compete for a building allocation through a program administered by the Tahoe Regional Planning Agency in which owners of vacant family lots are eligible to apply for a limited number of buildings reserved for parcels with IPES scores below the demarcation line. Also, the possibility exists to transfer the existing rights from the IPES score lot to another lot. In order to transfer all the development rights from the parcel, the parcel must be greenbelted by the recordation of an open space easement across the parcel. Should the owner of a zero IPES score lot elect to transfer the existing rights from the parcel to another parcel and greenbelt his lot, the buyer of the rights is eligible to receive 30 bonus points which equates to three bonus units. Finally, the owner of the greenbelled vacant lot is eligible to sell the lot to any number of agencies including the U.S. Forest Service and the State of Nevada or a private party. These lots are attractive to adjacent

property owners as they provide additional open space and privacy.

In summary, a zero IPES score vacant single family parcel in the Lake Tahoe Basin has one development right and 1% of its total land area in land coverage. Also, the owner is eligible to compete for a building allocation as well as receive three units upon retirement of the lot. Finally, the owner of the greenbelted lot has the option to sell his lot to a number of agencies or to a private party.

In order to arrive at an indication of an appropriate value for a vacant single family residential lot in the Washoe County portion of the Lake Tahoe Basin with a zero IPES score, these appraisers reviewed sale data in our files, contacted various Realtors in the Lake Tahoe Basin who are familiar with the transfer of development rights, and spoke with various representatives of the Tahoe Regional Planning Agency.

Residential development rights are eligible to be transferred from county to county within the Induce Tahoe Basin. According to information received i;ihese appraisers, a development right in the Washoe County portion of the Lake Tahoe Basin is currently worth approximately S2,500. However, the Washoe County development rights have in the past competed with development rights transferred to Washoe County from Placer County which were selling at approximately $1,500 per right. Additionally, development rights in the South Lake Tahoe portion of the Intake Tahoe Basin are currently selling for approximately $1,500. Based upon this it is these appraisers' opinion that a devleopment right has a value of between $1,500 and $2,500.

Additionally, small amounts of coverage in the Washoe County portion of the Lake Tahoe Basin have recently sold for between $6.00 and $12.00 per square foot. It is these appraisers' understanding that coverage transferred from one lot to another must be transferred from a lot with a lower IPES score to a lot with a higher IPES score. Because this letter addresses the value of coverage coming from a vacant lot with an IPES score of zero, it is our opinion that the possibility exists that a premium might be paud for coverage from a zero IPE5 score lot. However, these appraisers are unaware of any recent coverage sales in excess of $12.00 per square foot. Based upon this analysis, it is our opinion that the coverage from zero IPES score lot in the Washoe County

portion of the Lake Tahoe Basin could be sold for between $6.00 and $12.00 per square foot.

Assuming the owner of the property was in possession of a Washoe County building allocation, the allocation could be transferred to another parcel in Washoe County. The transfer of a building allocation involves retirement of the donor lot. As another alternative, the owner of a zero IPES score lot with a Washoe County building allocation could opt to sell the allocation and the development right together. These types of transfers have occurred for between $30,000 and $35.000.

Finally, once the development rights have been transferred from the zero IPES score lot and the lot has been greenbelted, the owner of the property might wish to sell the lot to various agencies or to a private party. Based upon information received by these appraisers, greenbelted lot sales for typical County portion of the Lake Tahoe Basin range from $7,125 to $16,750.

It has been a pleasure serving you in this assignment. Should you have questions or wish to discuss this letter, kindly contact us.

Respectfully submitted,

/s/ Stephen R. Johnson
Stephen R. Johnson, MAI, SREA
Nevada Certified General
License #00003

/s/ Lynn Barnett-Burton
Lynn Barnett-Burton
Real Estate Appraiser
Nevada Real Estate Intern
License #00261

SRJ/LBB:sh

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Attorney for Plaintiff

Filed 1/19/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,	)	Case No. CV-N-91-040-ECR
	)	
Plaintiff,	)	DECLARATION OF
	)	PAUL KALETA IN SUPPORT OF
vs .	)	PLAINTIFF'S
	)	RESPONSE TO DEFENDANT
TAHOE REGIONAL	)	TAHOE REGIONAL PLANNING
PLANNING AGENCY; and	)	AGENCY'S MEMORANDUM
STATE OF NEVADA.	)	CONCERNING ITS TRANSFER
	)	OF DEVELOPMENT PROGRAM
Defendants.	)	
	)	

Attached hereto as Exhibit A is the original Declaration of Paul Kaleta which was attached in facsimile form to Plaintiff's Response to Defendant Tahoe Regional Planning Agency's Memorandum Concerning its Transfer of Development Program filed on January 7, 1994.

DATED this 18th day of January, 1994.

/ss/WM. PATTERSON CASHILL, ESQ.
WM. PATTERSON CASHILL, ESQ.

Attorney for Plaintiff

(Certificate of Service omitted in printing.)

WM. PATTERSON CASHILL, ESQ.
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Attorney for Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, Plaintiff, vs. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA. Defendants.	)	Case No. CV-N-91-040-ECR **DECLARATION OF PAUL KALETA**

I, Paul Kaleta, hereby declare as follows:

1. I was previously employed by the Tahoe Regional Planning Agency (TRPA) as a Senior Planner in the Project Review Division. This employment occurred for over five years from the fall of 1984 to the spring of 1990. Since that time I have been employed full time as a land use planning consultant with Basin Strategies - Land Use Planning and Consulting. In this capacity, I am familiar with TRPA ordinances and application procedures for transfer of all land development commodities created by TRPA. When employed by the TRPA, I also reviewed and approved many applications for such projects. Additionally,

as a private land use planning consultant I have in-depth experience facilitating Tahoe Basin property owners in their attempt to transfer and receive compensation, and establish values for their TRPA development commodities. Thus, I have handled transfer of development rights both from the TRPA's and private sector's point of view.

2. I am familiar with Ms. Suitum's property with respect to the availability of all of the development commodities referenced in Mr. Lyn Barnett's affidavit dated December 7, 1993. In large part, I agree with the information presented in the fourteen paragraph affidavit as it concerns identifying the potential available development commodities on the above referenced property. However, I disagree with the subsequent claims made by TRPA legal counsel and the appraisal firm of Johnson-Wright and Associates regarding the value of these development commodities and the procedures and prerequisites for their transfer.

3. I maintain it is not necessary for Mrs. Suitum to make application for the transfer of these rights to determine the actual benefits of the program. As I will demonstrate, there is little to no value to these rights at the present time as there is either no market for them or the procedure for transferring one particular right would restrict the opportunity to transfer a remaining right.

4. The highest value estimated for any particular development commodity for the Suitum property was 830,000 to $35,000 for the development allocation. This value is inappropriate for the following reasons:

A. 1993 was the first year this parcel was eligible for receiving a building allocation consistent with TRPA's Ordinance 93-19. Previous to this past year, and since the adoption of the TRPA General Plan in 1987, this option was not available to the property owner. Indeed, only thirty such allocations were available to the thousands of unbuildable lots in the Basin. Therefore the probability of receiving an allocation is so minuscule as to be inconsequential. That neither the TRPA nor Mr. Johnson has cited to an actual comparable transaction is telling.

B. All of the six allocations issued to Washoe County property owners under this program in 1993 were returned back

to Washoe County because there was no market for the transferable allocations and they could not be sold. The market value for allocations could more correctly be considered to be zero, not $30,000 to $35,000 as stated by Mr. Johnson. Once again, the fact that Johnson-Wright and Associates do not cite any comparable transactions points out the illegitimacy of their valuation.

C. TRPA is trying, unsuccessfully, to create a market for these transferable allocations, however, new construction market factors will not allow it.

I have discussed these matters with Ms. Romany Woodbeck of the Washoe County Planning Department, who oversees the transfer program for Washoe County. She affirms that no transfers occurred in 1993.

5. TRPA and Johnson-Wright and Associates maintained the second highest value to the Suitum property was a sale to an adjacent property owner once the development rights were transferred. Johnson-Wright and Associates maintain that the adjacent property owner would pay $7,000 to $17, 00 for the 6 privilege of additional privacy. This is nonsense. Any sophisticated adjacent property owner must realize that when TRPA 8 assigns a zero IPES score to a residential property, it is undeniably and irreversibly considered permanent open space forever. No property owner would pay $7,000 to $17,000 for an empty lot that the government has effectively condemned by allowing no use of the land. The adjacent property owner could not even place a picnic table, dog house or garden on the referenced property as these structures would either create land coverage or disturb existing natural riparian vegetation.

I believe Johnson-Wright and Associates estimate of residual value could only have been derived from properties that have a higher than zero score, or with some opportunity for additional land coverage under the Bailey system if combined with their own properties. This assigned value of $7,000 to $17,000 is not realistic if the adjacent lot owner receives no benefits (privacy is already a certainty) and assumes only liability for this new land.

6. The Johnson affidavit estimates the third highest value for the development commodities as $6,000 to $10,000 for the

development right and associated bonus units. I concur that the original development right is valued between $1,500 and $2,500 however, of the 1,500 bonus units that are available for use in the basin less than 2% (two percent) have been utilized 3 basin wide since their inception 1987. No market exists for these commodities. Additionally, if the property owner were unfortunate enough to have transferred the development right from 6 this parcel between 1987 to 1992 she would not have been subsequently eligible to receive and/or transfer an allocation al a later date.

TRPA maintains that property owners have a "bundle of rights" available from unbuildable properties however, their policies and practices are in direct contrast to this position. During the first five years of the regional plan, if you elected to transfer your development right, you were not only ineligible to receive an allocation you were also not eligible to subsequently and retroactively receive credit for the bonus units if you failed to ask for them. This situation has occurred repeatedly in the past to numerous property owners who were not informed of these rights and were subsequently not given credit for them once the development right was removed. The bundle of rights theory is illusory. The long and short of Mrs. Suitum's situation is that she can do nothing with her now valueless land other than sell it at a "fire sale" price to the government.

7. Land coverage in hydrologic area #1 most recently has sold for $8.00 per square foot. The 183 square feet on the Suitum property would yield a gross value of $1,464.00. However, the application, advertising, consulting, and/or brokerage fees for this transaction would cost at least $464.00 leaving a residual value of $1,000.00.

8. Collectively considering the above referenced values, I believe it is more reasonable to assume the bundle of rights are valued at a low of $2,500.00 to a high of $7,500.00 under the best of circumstances.

9. TRPA submits that its transfer of development rights program is a meaningful and realistic course of relief for the plaintiff. This is not true. Additionally, the land does not retain significant residual value as an adjunct to the transfer remedies. If one could sell this land to an adjacent property owner for

$17,000, I suspect they could sell ice to Eskimos. There is no reason why the plaintiff in this case would have to demonstrate these transfer of development rights remedies are not available prior to adjudicating her claim.

I declare under penalty of perjury that this declaration was executed on the 7th day of January, 1994, at Zephyr Cove, Douglas County, Nevada.

/S/ Paul Kaleta
PAUL KALETA

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Attorneys for Defendant
Tahoe Regional Planning Agency

3/25/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, Plaintiff, v. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA, Defendants.	**CASE NO. CV-N-91-040-ECR** **SUPPLEMENTAL AFFIDAVIT OF STEPHEN R. JOHNSON IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

STATE OF NEVADA) ss.
CARSON CITY)

I, STEPHEN R. JOHNSON, hereby declare as follows:

1. I am currently President of Johnson-Wright & Associates, a professional Real Estate Appraisal firm.

2. I have been a professional Real Estate Appraiser active in the Northern Nevada area, including Lake Tahoe, for the past 24 years.

3. I am currently a Certified General Real Estate Appraiser in the States of Nevada and California.

4. I have held the MAI designation of the Appraisal Institute since 1976 and am currently certified by the Appraisal Institute.

5. I am professionally qualified to evaluate and appraise the value of and the marketability of coverage transfers, allocations, and bonus units in the Lake Tahoe area.

6. I have testified as an expert Real Estate appraiser in various federal and state courts within the States of Nevada and California in excess of 50 times.

7. I have personal knowledge of the matters hereafter stated, except as to any matters stated in my opinion. As to those matters, I believe my opinion to be true and correct.

PAUL KALETA AS A REAL ESTATE APPRAISER

8. On January 27, 1994, at 2:35 p.m., I confirmed with Ms. Dorothy Zimmerman, Supervisor of Licensing for the Nevada Division of Real Estate, that Mr. Paul Kaleta is not licensed or certified as a Real Estate Appraiser in the State of Nevada.

VALUE TO ADJACENT OWNER

9. It has been this appraiser's observation that a property owner is frequently motivated to buy adjacent property even though the property owners cannot reasonably anticipate future development of the adjacent site. The owner acquires the adjacent site to provide additional open space and greenbelt to his or her property. The open space lots are often acquired to expand the overall yards associated with the individual residences or to control the uses and activities which might occur on an adjacent property.

10. The demand for and value of these adjacent parcels in the Lake Tahoe Basin are demonstrated by the activities of the Nevada Division of State Lands. As a result of the Tahoe Basin Act, the Nevada Division of State Islands has acquired hundreds of environmentally sensitive parcels in the Lake Tahoe Basin over the past five years. After encumbering the parcels with an open space easement, the State of Nevada has sold a number of

the parcels to adjacent property owners. Based upon a review of the open space restrictions which are placed upon each property prior to a re-sale, it is my opinion that the parcels sold by the Nevada Division of State Lands under the Tahoe Basin Act involve more limited development potential and more restricted uses than those permitted under the Tahoe Regional Planning Agency's Rules and Reguladons for a SEZ lot which has an IPES score of zero.

11. Attached as Exhibit "A" to this Affidavit is a true summary of some of the open space lots in the Lake Tahoe Basin portions of Washoe and Douglas Counties, which were first acquired by the State of Nevada and then resold by the state to adjacent owners over the past several years. These sales demonstrate the demand and values which can be achieved for open space lots in the Lake Tahoe Basin.

"FIRE SALE" PRICE TO THE GOVERNMENT

12. On page 5, lines 20 through 22 of his declaration, Mr. Kaleta indicates that Mrs. Suitum can do nothing with her now valueless land other than sell it a "Fire Sale" price to the Government. In fact, under the Tahoe Basin Act, the State of Nevada has already offered Mrs. Suitum $35,000 for her property. Mrs. Suitum rejected the offer. In an interview with Mrs. Sarah Grable of the Nevada Division of State Lands, she indicated that there are still funds available to purchase environmentally sensitive lots. It is therefore this appraiser's opinion that Mrs. Suitum's lot could still reasonably be anticipated to be purchased by the State of Nevada under the Tahoe Basin Act for a price of $35,000.

COMPARABLE SALE DATA

13. On page 3, lines 9 and 10 of his declaration, Mr. Kaleta alludes to a lack of comparable sales data offered by our firm. Accordingly, the following sales data has been compiled. According to realtors and developers in the Incline Village area that we have interviewed, residential building allocations and development rights are bought and sold in Washoe County on a regular basis.

(a) A recent sale of TRPA development rights in the Incline Village area of Washoe County is set forth as follows:

In July of 1993, one residential development right was transferred from Washoe County Assessor's Parcel Number 126-590-07 to a parcel located on Cottonwood Court. The sale price was $6,000. Typical sale prices for development rights in the Incline Village area range from $1,500 to $6,000 each. The low end of the scale is reflective of development rights which are transferred into Incline Village from Placer County.

(b) Some recent sales of TRPA building allocations in the Incline Village area of Washoe County are set forth as follows:

In February of 1993, a building allocation was sold for $20,000. This building allocation was transferred to 484 Country Club Drive. In November of 1993, one building allocation was sold for $9,000. This allocation was transferred to 943 Dorcey Drive. It should be noted that this second allocation was due to expire in one month. Additionally, in July of 1993, one building allocation was sold for $20,000. This allocation was transferred to 573 Valley Drive. Typical sale prices for building allocations in the Incline Village area of Washoe County range from $17,000to $25,000.

(c) Some recent sales of one building allocation plus one development right in the Incline Village area of Washoe County are set forth as follows:

In September of 1993, seven building allocations plus development rights were sold for $18,500 each. These were transferred from Placer County Assessor's Parcel Number 117-100-26 to Washoe County A.P.N. 124 041-79. It should be noted that these transferred rights had no time constraints placed upon them. Also in 1993, one allocation plus development right was transferred for $35,000. These rights were transferred to the lakefront estate owned by the Heller family. Finally, there are 56 allocations plus development rights currently in escrow in Incline Village for $32,000 each.

(d) Some recent sales of vacant open space parcels of land in the Incline Village area of Washoe County with one building allocation, one development right and one bonus unit are set forth as follows:

In 1991, Assessor's Parcel Number 126-530-09 sold for $25,000. This parcel included one building allocation, one development right, and one bonus unit. Each of the rights was subsequently transferred off the property. Also, in June of 1993, Assessor's Parcel Number 126-590-7 sold for $32,000. This lot included one building allocation, one development right and one bonus unit. The building allocation was subsequently transferred from the property and sold for $20,000. The development right was subsequently transferred and sold for a sale price of $6,000.

I declare, under penalty of perjury, under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Carson City, Nevada, March 10, 1994.

/s/ STEPHEN R. JOHNSON
STEPHEN R. JOHNSON, MAI, SREA

SUBSCRIBED and SWORN to Before me
this 24th day of March, 1994.

/s/ Lauren Arends
Notary Public

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3/25/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM, Plaintiff, v. TAHOE REGIONAL PLANNING AGENCY; and STATE OF NEVADA, Defendants.	) CASE NO.) CV-N-91-040-ECR)) AFFIDAVIT OF) SUSAN E. SCHOLLEY) IN SUPPORT OF MOTION) FOR SUMMARY JUDGME))	

STATE OF NEVADA) ss.
CARSON CITY)

I, SUSAN E. SCHOLLEY, hereby declare as follows:

1. I am currently employed by the Tahoe Regional Planning Agency (TRPA) as the Special Projects Attorney.

2. I have been employed by TRPA as legal counsel, in various positions, since March 1983, and as such am familiar with the ordinance and application processes for transfers of land coverage, development rights and allocations.

3. As an attorney for TRPA, I have been responsible for overseeing and implementing the residential allocation system since the adoption of the 1987 Regional Plan. I have worked

closely with the county staff in Washoe County since 1986 on allocation distributions.

PROCEDURES FOR DEVELOPMENT OF RESIDENTIAL LOTS WITHIN THE TAHOE BASIN

4. In order for a property owner to build a single-family residence on his property within the Tahoe Basin he must possess the following elements.

A. An IPES score above the minimum score established for development in that calendar year.

B. A "Residential Development Right".

C. Adequate land coverage.

D. A "Residental Allocation".

5. A person may not develop a residential lot until such time as the IPES score for his lot is equal to or above the IPES line for that year. This is true regardless of whether the person possesses the other three elements. [Mrs. Suitum's IPES score is 0]

6. Each undeveloped residential lot within the basin was assigned one "Residential Development Right" in 1987. A "Residential Development Right" authorizes the building of a single family residence or unit on the lot if the owner possesses the other elements. [Mrs. Suitum possesses one "Residential Development Rights].

7. Land coverage is assigned to each lot in square footage based upon an analysis under TRPA's IPES system. Land coverage refers to the percentage of the lot which may be covered by impervious surface, such as the residence, driveway and decks. [Mrs. Suitum's lot is assigned 183 square feet of coverage].

8. A total of 300 "Residential Allocations" are distributed each year. Initially, all 300 "Residential Allocations" were assigned to the counties for distribution to lot owners. The method of distribution was left to the discretion of each county. Historically, most counties would only issue an allocation to a person with an IPES score above the IPES line, although, from 1987-1989, Washoe County issued allocations to any interested person regardless of their IPES score. However, by 1992, persons

with parcels below the IPES line were not able to obtain a "Residential Allocation" in any of the counties. In order to reinstate the full range of options under the TRPA Regional Plan, TRPA, beginning in 1993, earmarked 10% of the "Residential Allocations" each year for lots with IPES scores below the line. Since the recipients of the earmarked "Residential Allocations" are parcels below the IPES line, use of the earmarked "Residential Allocations" is limited to the sale or transfer of the allocation to a parcel with an IPES score above the line. These earmarked "Residential Allocations" are distributed by TRPA in annual random drawings by county. "Residential Allocations" which are not used within the year of their distribution are returned to the county and TRPA for redistribution the next year. Mrs. Suitum held a "Residential Allocation" in 1989 but did not use or transfer it, and the "Residential Allocation" therefore went back to the county. Mrs. Suitum has not applied for or received a "Residential Allocation" since].

9. All of the elements listed in Paragraph 4. above, except the IPES score, may be sold and transferred to other lots under procedures established by TRPA.

10. A lot which cannot be developed under IPES may also be sold with or without the land coverage, the "Residential Development Right" and, if applicable, the "Residential Allocation", to a party interested in owning the property but not developing it.

RESIDENTIAL ALLOCATIONS

11. Contrary to the statements in Paul Kaleta's affidavit that 1993 was the first year the Suitum property was eligible for a "Residential Allocation" (Paragraphs 4.A and 4.B on page 3), Washoe County permitted the distribution of "Residential Allocations" with IPES scores below the line from 1987 to 1989. As evidence of that fact, the Washoe County list of "Residential Allocation" holders in 1989 includes the Suitum parcel.

12. There is a statement in Mr. Kaleta's affidavit that in 1993 the "probability of receiving an allocation [was] so minuscule as to be inconsequential. " (Paragraph 4.A on page 3). In reality, there were a maximum of 400 parcels below the IPES line eligible to compete for the six earmarked "Residential Allocations" available in 1993 in Washoe County, and the actual

number of parcels which competed was less than thirty. Therefore, if Mrs. Suitum had applied for a "Residential Allocation" in 1993, she would have had approximately one chance in five of receiving a "Residential Allocations.

13. Contrary to Mr. Kaleta's affidavit (Paragraph 4.C on page 3), "Residential Allocation" transfers have occurred in Washoe County from 1987 to the present. Pursuant to its Rules of Procedure (Article V, Section 5.16), TRPA maintains a daily log of its actions on all project applications. A review of the TRPA project log shows that at least 111 "Residential Allocation" transfers have been approved in the Tahoe Region since July 1987. Of those 111 "Residential Allocation" transfers, 23 were in Washoe County. Although it is true that none of the "Residential Allocations" distributed by TRPA in the 1993 drawing for parcels below the IPES line were transferred, several "Residential Allocation" transfers were approved in Washoe County in 1993 using "Residential Allocations" assigned under a litigation settlement agreement with a homeowners' association.

TRANSFER OF RESIDENTIAL DEVELOPMENT RIGHTS

14. Each vacant parcel existing on the effective date of the 1987 plan was assigned a "Residential Development Right". Similar to the "Residential Allocations, a "Residential Development Right" is necessary before a person can build on his or her property. One "Residential Development Right" is required for each residential unit to be constructed. Thus, if a person desired to construct a duplex on his land, he would need two "Residential Development Rights" (as well as two "Residential Allocations"). Contrary to the statement in Mr. Kaleta's affidavit (Paragraph 6 on pages 4-5), a review of the TRPA project log shows that at least 55 transfers of "Residential Development Rights" have been approved from July 1987 to the present. Of those transfers, eight were from Washoe County parcels.

BONUS RESIDENTIAL RIGHTS

15. There are 1600 bonus "Residential Development Rights" available for the 20year life of the 1987 TRPA Regional Plan (not 1500 as alleged by Paul Kaleta in his affidavit). A

bonus "Residential Development Right" has the same function, and is utilized in the same manner, as a "Residential Development Right". The bonus "Residential Development Rights" may be earned in a variety of ways, one of which is the retirement of a SEZ parcel that earns three bonus "Residential Development Rights". Approximately 90 bonus "Residential Development Rights" out of this regional pool have been assigned to qualifying projects and used for the construction residential units. Contrary to the statement in Mr. Kaleta's affidavit (Paragraph 6 on pages 4-5), several projects earned bonus "Residential Development Rights" for the retirement of sensitive parcels and some of those projects received three bonus "Residential Development Rights" because the retired parcels were SEZ parcels (the multiplier referenced in Paragraph 9 of Lyn Barnett's affidavit filed with TRPA's prior memorandum).

SIMULTANEOUS TRANSFERS
OF RESIDENTIAL DEVELOPMENT
RIGHTS, RESIDENTIAL ALLOCATIONS AND
BONUS RESIDENTIAL DEVELOPMENT RIGHTS

16. Contrary to statements in Mr. Kaleta's affidavit (Paragraph 6 at pages 4-5), a "Residential Development Right" and a "Residential Allocation" can be transferred simultaneously and independently of each other. A review of the TRPA project log shows that this has, in fact, occurred at least three times in Washoe County. As to bonus "Residential Development Rights l, if a property owner does not apply for bonus Residential Development Rights", they are not automatically awarded. Mrs. Suitum is not affected by the alleged loss of rights situation referred to in Paul Kaleta's affidavit on page 5 at lines 12 through 22. Mrs. Suitum did, and still does, have the opportunity to transfer both a "Residential Allocation" and a "Residential Development Right", and to apply for an assignment of bonus "Residential Development Rights n earned in conjunction with those transfers.

USE OF SEZ/OPEN-SPACE PARCELS

17. Mr. Kaleta is incorrect in his allegation in Paragraph 5 at page 4 of his affidavit, that an adjoining landowner purchaser cannot use a property with a zero IPES score. While

the TRPA Code prohibits creation of coverage or permanent disturbance of the land, a structure or activity, that allows 75 percent or more of the precipitation to reach the ground and permits the growth of vegetation, could be placed on the property. Examples of such structures are: chaise lounges and patio table, jungle gyms, swing sets, pet enclosures, picnic table, volleyball or badminton sets, and garden trellises. Also, TRPA would permit gardening and landscaping on a zero IPES score parcel subject to standard TRPA limitations on such uses. Also, the adjoining property owner, if he acquired the Suitum parcel, could fence the property to provide privacy and to create a new larger parcel, thereby increasing the resale value of the property.

I declare, under penalty of perjury under the laws of the State of Nevada, that the foregoing statements are true and correct.

Executed at Carson City, Nevada, on March 24, 1994.

/s/ Susan E. Scholley
Susan E. Scholley,
Special Projects Attorney
Tahoe Regional Planning Agency

Subscribed and Sworn to Before me
this 24th day of March, 1994.

/s/ Lauren Arends
Notary Public

LAUREN ARENDS
NOTARY PUBLIC - NEVADA
CARSON CITY,
My Appt. Expires Jan 4, 1997

(Certificate of Service by Mail omitted in printing.)

3/30/94

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BERNADINE SUITUM,
Plaintiff,

CV-N-91-040-ECR

v.

ORDER

TAHOE REGIONAL
PLANNING AGENCY; and
STATE of NEVADA,
Defendants.

/

This case involves a takings claim by plaintiff Suitum, the owner of a single-family residential lot in Incline Village, Washoe County, Nevada, classified as stream environment zone (SEZ), to recover damages because she is not allowed to build a residence on the property. Plaintiff has appealed the score of her lot under the Individual Parcel Evaluation System (IPES) but has not attempted to transfer development rights from the parcel at issue to another parcel under the transfer development plan created by Tahoe Regional Planning Agency (TRPA).

Defendants filed a motion for summary judgment (document #66) arguing, in part, that this Court has no jurisdiction over this action because plaintiff's claim is no ripe. Specifically at issue is the fact that plaintiff has failed to apply to TRPA to transfer development rights from her property. It is argued therefore, that plaintiff has not pursued the key avenue of relief for one owning SEZ land in the Lake Tahoe Basin.

This Court ordered that the parties submit supplemental briefs regarding the procedures, prerequisites, and value of the transfer of development rights as applicable in this case so that the Court could determine if the only avenue not yet pursued was a application for a meaningful use of the property (Order dated November 23, 1993 document #71). The parties submitted briefs

and additional affidavits on the issue.[2] The briefing on this issue was completed on February 28, 1994 and the Court addresses the issue in this expedited order.

Ripeness of a claim governs the power of a federal court to act in a takings case. This Court does not have subject matter jurisdiction unless the claim is ripe. *Macdonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456-57 (9th Cir. 1987) *modified*, 830 F.2d 968 (9th Cir. 1987) *cert. denied*, 484 U.S. 1043 (1988).

An essential prerequisite to a regulatory takings claim is the final and authoritative determination of the type and

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[2] The affidavit of Paul Kaleta is inadequate under FRCP 56(e) and is disregarded by the Court. There is no showing that Mr. Kaleta is an expert. In order for opinions and conclusions to be transformed into evidence admissible at trial such opinions and conclusions must be offered by a qualified expert. A witness may be qualified as an expert by knowledge skill, experience, training or education...: FRE 702. While Mr. Kaleta's affidavit is full of opinions and conclusions as to the value of Plaintiff's development rights, he is not neither licensed nor certified as a real estate appraiser in the State of Nevada nor has he recited any knowledge, skill, experience, training or education which would qualify him to testify as an expert as to the valuation of development rights with which this Court is concerned.

intensity of use legally permitted on the subject property. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes. *Macdonald, Sommer & Frates v. Yolo County*, at 348.

As things now stand, there is no final decision as to how plaintiff will be allowed to use her property. *See Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-191 (1985). The Court is convinced that the transfer rights are significant to the takings calculus. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 137 (1978); *American Savings & Loan v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981) (recognizing that transferable development rights mitigate financial burdens of zoning regulations and must be considered when considering the economic impact of a regulation). The briefing and affidavits presented to the Court on the issue illustrates that the transfer of development rights program created by TRPA is specifically designed to give relief to owners of SEZ properties. The finality, in terms of allowed use of the property, may only be determined after plaintiff applies to transfer her development rights. The specific examples of sales of rights in the past demonstrates there is significant value in the transfer of residential development rights and transfer of residential allocations which plaintiff may be entitled to. In fact, an application for transfer is the only "meaningful application" that can be made once property is determined to be SEZ. *See Kinzli* 818 F.2d at 1454-1455. In addition, there may be significant residual value as an adjunct to the transfer remedies.

The determination that the application for transfer rights is necessary before the takings claim in the case at hand can be considered ripe also comports with the other cases holding that pursuit of transfer rights is among the list of things that must be pursued in order for a takings claim to be ripe. *See Tahoe Preservation v. Tahoe Regional Planning*, 638 F.Supp. 126, 132-133 &n.6 (D.Nev. 1986) *vacated in part on other grounds*, 911 F.2d 1331 (9th Cir. 1990), *cert. denied* 111 S.Ct. 1404 (1991); *Tahoe Sierra Preserv. v. Tahoe Reg. Planning Agency*, 911 F.2d 1331, 1334 n.3 (Fletcher J., concurring), *cert. denied*, 111 S.Ct. 1404 (1991); *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D.Nev. 1992).

Absent an application to transfer development, and a final decision on such application, we cannot know whether plaintiff's land indeed is unusable. Without a decision as to the transfer rights of the property, the economic impact of the challenged regulation and the extent it interferes with plaintiff's reasonable investment-backed expectation, cannot be assessed. *Id.* Suitum's takings, substantive due process and equal protection claims are not ripe for consideration by this court. Plaintiff may not take her claims to trial without applying to transfer her development rights. TRPA's endeavor to do equity to SEZ holders would be rendered utterly meaningless. Moreover, until values attributable to the transfer program are known, the court cannot realistically assess whether and to what extent TRPA's regulations have frustrated plaintiff's reasonable expectations.

Plaintiff's claims are not ripe and this Court does not have jurisdiction over this action.

IT IS THEREFORE HEREBY ORDERED that TRPA's Motion for Summary Judgment (document #66) is GRANTED on all claims. The Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that Plaintiff's Cross Motion for Summary Judgment (document #68) is MOOT.

IT IS FURTHER ORDERED that Defendant's Motion for Protective Order Striking Supplement to Answers to Interrogatories and for Expenses (document #78) is DENIED. The affidavit of Paul Kaleta and the Court's reliance thereon is addressed in this order at N.1.

DATED: March 30th 1994.

s/s EDWARD C. REED
UNITED STATES DISTRICT JUDGE

4/01/94

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNADINE SUITUM,	)	
	)	No.94-15768
Plaintiff-Appellant,	)	
v.	)	D.C. No.
	)	CV-91-040-ECR
TAHOE REGIONAL	)	
PLANNING AGENCY,	)	**OPINION**
	)	
Defendant-Appellee.	)	

Appeal from the United States District
Court for the District of Nevada
Edward C. Reed, District Judge, Presiding

Argued and Submitted
November 13, 1995--
San Francisco, California

Filed: April 1, 1996.

Before: Mary M. Schroeder and
Arthur L. Alarcon, Circuit Judges,
and Owen M. Panner,* District Court Judge

Opinion by Judge Panner

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Individual Rights/Constitutional Rights/Real Estate

The court of appeals affirm a district court judgment. The court held that a property owner's claim that an agency committed an unconstitutional taking when it refused to permit her to build a home on her residential lot was unripe, where the owner had not applied for a transfer of her development rights through an available program.

A 1987 plan (Plan), which was drafted pursuant to the 1980 Tahoe Regional Planning Compact, included an Individual Parcel Evaluation System (IPES), under which appellee the Tahoe Regional Agency (TRPA) assigned a numerical score to a residential lot depending on its relative environmental suitability for development. The TRPA annually established a numerical IPES level enabling owners of parcels with IPES scores above a certain level to seek building permits. The Plan also created Stream Environment Zones (SEZs) and allowed no new land coverage or other permanent land disturbance with SEZs, except for certain limited public uses. The Plan established criteria that a property owner had to meet before building a single-family residence.

The Transfer of Development Rights (TDR) program allowed for transfers of land coverage, residential development rights, and residential allocations. For property within a SEZ, the property owner could transfer one percent of the total property area. Subject to county approval and the receiving parcel's use and density eligibility, residential development rights could be transferred anywhere in the Lake Tahoe Basin. Property owners were allowed to transfer a residential allocation from a parcel with a low IPES score to any parcel that had an IPES score above the annual IPES level.

Appellant Bernadine Suitum owned property located in a SEZ in the Basin. Suitum had one residential development right and 183 square feet of land coverage available to transfer. She did not apply for another residential allocation or to transfer her

residential development right or available land coverage under the TDR program. Suitum brought a civil rights action against the TRPA, alleging that it committed an unconstitutional taking and violated her substantive due process and equal protection rights when it refused to permit her to build a home on her residential lot. The district court granted summary judgment to the TRPA, concluding that Suitum's claims were unripe. Suitum appealed.

[1] The "final decision requirement" required Suitum to show that before filing suit, she sought a final decision from the TRPA in regard to the application of the regulation to the property. **[2]** Suitum had to apply for the transfer of her development rights through the TDR program before her claim would be ripe. **[3]** Without an application for the transfer of development rights, the TRPA was foreclosed from determining the extent of the use of her property. **[4]** Without pursuit of the transfer of development rights, it could not be known whether the regulations went too far; no one knew how far the regulations went. Without attempting to transfer the rights she possessed, Suitum could not know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations. **[5]** Within the unique TRPA regulatory scheme, transfer of development rights was a "use" of SEZ property.

[6] The district court did not abuse its discretion in excluding from ripeness analysis an affidavit from a former TRPA staff member familiar with TRPA ordinances and application procedures for transfer of development commodities. **[7]** The specific issue on which expert testimony was relevant was the value of Suitum's transfer of development rights. The former staff member was not an appraiser. **[8]** Given that Suitum's development rights possessed significant value, she failed to meet her burden of showing that participation in the TDR program was futile.

[9] Compliance with the final decision process is required to establish a ripe claim, even where it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations.

COUNSEL

William Patterson Cashill, Reno, Nevada, for the plaintiff-appellant.

J. Thomas Susich, Vicki E. Hartigan, Crowell, Susich, Owen & Tackes, Carson City, Nevada, for the defendant-appellee.

OPINION

PANNER, District Judge:

In this 42 U.S.C. S 1983 action, Bernadine Suitum alleges that the Tahoe Regional Planning Agency (TRPA) committed an unconstitutional taking and violated her rights to substantive due process and equal protection when it refused to permit her to build a home on her residential lot in the Lake Tahoe Basin. The district court concluded that Suitum's claims were unripe and granted summary judgment to TRPA. We affirm.

BACKGROUND

I. TRPA

TRPA was created in 1969 by the Tahoe Regional Planning Compact. Pub. L. 91-148, 83 Stat. 360; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1969 Compact); *amended*, Pub. L. 96-51, 94 Stat. 3233; Cal Gov't Code § 66801; Nev. Rev. Stat. § 277.200 (1980 Compact). We have previously detailed TRPA's background and it need not be repeated here. *See, e.g., People of Calif. v. Tahoe Regional Planning Agency*, 766 F.2d 1308, 1310-1312 (9th Cir.), *amended*, 775 F.2d 998 (9th Cir. 1985).

II. The 1987 Plan

The 1987 Plan, drafted pursuant to the 1980 Compact, governs development of Suitum's property and includes the Individual Parcel Evaluation System (IPES) under which TRPA assigns a numerical score to a residential lot depending on its relative environmental suitability for development. *See Carpenter v. Tahoe Regional Planning Agency*, 804 F. Supp. 1316, 1320 (D. Nev. 1992)(listing relevant environmental criteria). TRPA annually establishes a numerical IPES level enabling owners of parcels with IPES scores above the stated level to seek building permits. Owners of parcels with IPES scores below that level may proceed with development only if the level is lowered. *Id.*

The 1987 Plan also creates Stream Environment Zones (SEZs) which generally convey surface water from upland areas

into Lake Tahoe and its tributaries. The 1987 Plan allows no new land coverage or other permanent land disturbance within SEZs, except for certain limited public uses.

Finally, the 1987 Plan establishes four criteria that the property owner must meet before building a single-family residence: (1) an IPES score above the numerical level established for development in that calendar year; (2) a residential development right; (3) adequate land coverage; and (4) a residential allocation.

III. Transfer of Development Rights

The Transfer of Development Rights (TDR) program is "an elaborate system of transfers of development rights[,]" *id.*, which allows for transfers of land coverage, residential development rights, and residential allocations. A property owner may transfer land coverage to a receiving parcel within the same hydrologic zone allowing for construction of a larger project on the receiving parcel. For property within a SEZ, the property owner is allowed to transfer one percent of the total property area. For example, Suitum's property is approximately 18,300 square feet. Because it is located in a SEZ, she is allotted 183 square feet of land coverage to transfer to another parcel.

Subject to county approval and the use and density eligibility of the receiving parcel, residential development rights may be transferred anywhere in the Lake Tahoe Basin. Property owners may transfer a residential allocation from a parcel with a low IPES score to any parcel with an IPES score above the annual IPES level.

IV. Development of Suitum's Property Under the 1987 Plan

Suitum purchased the property in 1972 and first attempted development of the lot in 1989 when she obtained a residential allocation from Washoe County for the construction of a house. After a field verification, TRPA initially determined that the property was entirely located in a SEZ and then assigned it a zero IPES score. Suitum appealed. TRPA upheld the IPES score on the basis that the lot was located in a SEZ.

Suitum has one residential development right and 183 square feet of land coverage available to transfer. Although she obtained

a residential allocation in 1989, she did not use it that year and it reverted back to the county. Suitum has not applied for another residential allocation. Suitum has not applied to transfer her residential development right or available land coverage under the TDR program.

DISCUSSION

I. Standard of Review

A grant of summary judgment is reviewed de novo. *Han v. Mobil Oil Corp.*, No. 94-55373, slip op. 15379, 15382, 1995 WL 728210 at *1 (9th Cir. Dec. 11, 1995). Our review is governed by the same standard used by the trial court under Federal Rule of Civil Procedure 56(c). *Id.* at 15383. We must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Id.*

II. General Taking Claim Standards

A regulatory taking in violation of the Fifth Amendment, such as that alleged by Suitum, occurs if the regulation "denies an owner economically viable use of his land." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 473 (9th Cir. 1994). "[T]he term 'economically viable use' has yet to be defined with much precision." *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 616 (9th Cir. 1993). However, "the existence of permissible uses generally determines whether a development restriction denies a property holder the economically viable use of its property." *Id.* The regulation's economic impact and the extent to which it interferes with investment-backed expectations are relevant to the inquiry. *Penn Cent. Transport Co. v. City of New York*, 438 U.S. 104, 124 (1978). In sum, "determining whether a regulatory action effects a taking requires complex factual assessments of the purposes and economic effects of government actions[.]" *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 685 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 924 (1994).

II. Ripeness Requirements for As-Applied Claims

A. Ripeness

[1] An "as applied" challenge is "a claim that the particular impact of a government action on a specific piece of property requires the payment of just compensation." *Carson Harbor*,

37 F.3d at 474. We have previously noted that there are "two independent hurdles to the filing of a [regulatory] taking claim in federal court against a state or local government." *Id.* (citing *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985)). Only the first, known as the "final decision requirement," is at issue in this case and it requires Suitum to show that before filing suit, she sought a "final decision from [TRPA] regarding the application of the regulation to the property at issue." *Carson Harbor*, 37 F.3d at 474.[1]

We recently explained that finality "helps the court evaluate whether regulation of the subject property is excessive by identifying the extent of the regulation." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995). The court cannot "determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Kinzli*, 818 F.2d at 1453 (quoting *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 348 (1986)).

[2] We have not previously discussed the effect of a transfer of development rights on a regulatory taking claim. However, Judge Fletcher has made clear, in dicta, that she would require pursuit of transfer of development rights before a regulatory taking claim against TRPA could be considered ripe. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1344 n.3 (9th Cir. 1990)(Fletcher, J. concurring), *cert. denied*, 499 U.S. 943 (1991). As explained below, we agree with Judge Fletcher, and the district court, and conclude that Suitum must apply for the transfer of her development rights through the TDR program before her claim is ripe.

[3] Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use

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[1] These ripeness requirements are equally applicable to the due process and equal protection claims. *See Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1231-32 (9th Cir.) (substantive due process), *cert. denied*, 115 S. Ct. 193 (1994); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1455-56 (9th Cir.) (equal protection and substantive due process), *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

of Suitum's property. *Dodd*, 59 F.3d at 858. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 503 (9th Cir.), *cert. denied*, 502 U.S. 498 (1990).

[4] Without pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. *MacDonald*, 477 U.S. at 348. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" *Kinzli*, 818 F.2d at 1453, and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis. *Youpee v. Babbitt*, 67 F.3d 194, 197 (9th Cir. 1995).

[5] Although in the more typical scenario a plaintiff may face a municipal planning board which reviews modified development plans or requests for variances, here, the TDR program effects the same purpose: facilitating alternative uses of the property. We recognize that TRPA's regulatory scheme is unique and conclude that within that scheme, transfer of development rights is a "use" of SEZ property. The key inquiry is whether the property retains "any reasonable beneficial use[.]" *MacDonald*, 477 U.S. at 349. That the possible uses under TRPA's unusual procedure are transfers of development rights *from* Suitum's property rather than, for example, reapplications of development plans *for* her property, is immaterial.

B. Futility Exception

We recognize a "limited" futility exception to the ripeness doctrine. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1501 (9th Cir. 1990). Generally, the final decision requirement is excused if the plaintiff shows that it would be an "idle and futile act" or that the application procedures are unfair. *Kinzli*, 818 F.2d at 1454, 1455; *Del Monte Dunes*, 920 F.2d at 1496 (plaintiff's burden).

Suitum argues that her claims are ripe because the TDR program is a "ruse, a sham." She contends that the TDR program has produced no sales and that her property has no marketable

development rights. In support of her argument, she relies on the affidavit of her expert, Paul Kaleta, a former TRPA staff member who is now a private consultant and who is familiar with TRPA ordinances and application procedures for transfer of development commodities.

In support of its contention that pursuit of transfer of development rights under the TDR program is meaningful, TRPA relies on the affidavit of Certified Appraiser Stephen R. Johnson who has twenty-four years of appraising experience in the Lake Tahoe area. He attests that Suitum's development rights have value.

1. Exclusion of Kaleta's Affidavit

[6] The district court concluded that there is significant value in the transfer of residential development rights and transfer of residential allocations. In reaching this conclusion, the district court disregarded Kaleta's affidavit and relied only on the valuation evidence submitted by TRPA. We conclude that the district court did not abuse its discretion in excluding Kaleta's affidavit from the court's ripeness analysis.

We review "a district court's decision to admit or exclude expert testimony for an abuse of discretion." *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995). "Generally, a district court abuses its discretion when it bases its decision on an erroneous view of the law or a clearly erroneous view of the facts." *Id.*

[7] Suitum contends that Kaleta's experience as a TRPA regulator qualifies him to testify as to the value of her development rights. To offer an expert opinion, Kaleta must possess the required knowledge, skill, experience, training, or education. Fed. R. Evid. 702. The specific issue on which expert testimony is relevant is the value of Suitum's transfer of development rights. It was not a clear error of judgment for the district court to conclude that a licensed appraiser or someone with demonstrated experience in *valuation* was the proper expert on this issue. Kaleta is not an appraiser either by experience, education, or other training. His experience in facilitating property owners in TDR program transfers is not equivalent to experience in assigning a market value to TRPA development rights. The district court's exclusion of Kaleta's affidavit was not an abuse of discretion.

[8] TRPA's evidence shows that without an allocation right, Suitum's development rights are valued from $10,000 to $21,500 or more. With an allocation right, the value increases by approximately $30,000. Given that Suitum's development rights possess some significant value, Suitum fails to meet her burden of showing that participation in the TDR program is futile. Thus, her application to the TDR program is required to present ripe taking, equal protection, and substantive due process claims to the court.

Finally, we reject Suitum's suggestion made at oral argument that because the TDR program is not designed to give her just compensation, she need not participate in it to demonstrate ripeness. In the regulatory taking analysis, a taking must be established before the question of just compensation arises. The object of the final decision requirement is to determine whether a taking has occurred at all, independent of any compensation issue, by examining the extent of the regulations' economic impact and interference.

[9] Pursuit of a final decision in general, and application to the TDR program in particular, may mitigate the regulations' economic effect and result in a diminution in value rather than a more severe economic impact. The imposition of regulatory ordinances that merely diminish the value of property does not constitute a taking. *See, e.g., William C. Haas & Co., Inc. v. City and County of San Francisco*, 605 F.2d 1117, 1120 (9th Cir. 1979) (diminution of property value from $2 million to $100,000 not a taking), *cert. denied*, 445 U.S. 928 (1980). Therefore, compliance with the final decision process is required to establish a ripe claim, even when it is apparent that the process will not provide the same value that the landowner may have had absent the impacting regulations. Because Suitum failed to apply for transfers of development rights through the TDR program and fails to demonstrate that such an application would be futile, her claims are unripe for adjudication.

III. TRPA's Request for Attorney's Fees on Appeal

Pursuant to 42 U.S.C. § 1988, TRPA asks for attorneys' fees for defending this appeal. We may award attorneys' fees under section 1988 to the prevailing party for fees on appeal. *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1213 (9th Cir.

1986), *amended* 808 F.2d 1373 (9th Cir. 1987). We reject TRPA's request for fees. Suitum's claim was not frivolous or groundless and fees are inappropriate under the circumstances. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) (court may award section 1988 fees when the claim is "frivolous, unreasonable, or groundless").

AFFIRMED.

Filed 5/13/96

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BERNADINE SUITUM,	)	
	)	
Plaintiff-Appellant,	)	No. 94-15768
v.	)	D.C. No.CV-91-040-ECR
	)	
TAHOE REGIONAL	)	
PLANNING AGENCY,	)	ORDER
	)	
Defendant-Appellee.	)	

Before: SCHROEDER and ALARCON, Circuit Judges, and PANNER,* District Judge

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Owen M. Panner, Senior United States District Judge for the District of Oregon, sitting by designation.